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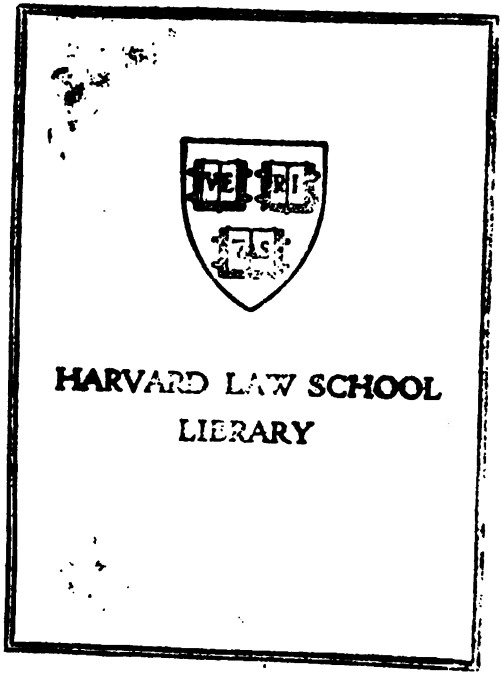
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Greene

REPORTS

OF

CASES IN LAW AND EQUITY

SUPREME COURT

OF THE

STATE OF IOWA.

By GEORGE GREENE,
One of the Judges.

VOL. III.

CEDAR RAPIDS:
J. G. DAVENPORT & CO., PRINTERS.

1857.

Entered according to Act of Congress,
In the year one thousand eight hundred and fifty-seven,
By GEORGE GREENE,
In the Clerk's office of the District Court of the United States in and for the district of Iowa.

Rec Aug 26. 1857

J. G. DAVENPORT, YOUNG & CO., BINDERS,
CEDAR RAPIDS, IOWA.

PREFACE.

THE delay in the publication of this volume may need explanation. As the Reporter lost money by his second volume, he decided not to publish another until more adequate reumneration should be provided by law. That was done by the last General Assembly; and hereafter it is to be hoped that the Reports of the Supreme Court will appear more regularly. This volume will soon be followed by a fourth, which will comprise all the Opinions anterior to those so promptly published by WM. PENN CLARKE, Esq.

SUPREME COURT

RULES

DURING TERM OF THIS VOLUME.

I.

At the commencement of each term, the causes will be called in order, but no cause will be tried on the first calling, nor shall any but a continued cause be tried on the first day of the term, unless by consent of parties. The same rule will be observed at any adjourned term, where the adjournment has been more than thirty days unless specially ordered otherwise, at the time of the adjournment.

II.

Upon the second calling either party has a right to a trial unless for good cause shown. If passed by the consent of both parties, the cause will go to the foot of the docket, unless for cause the court shall otherwise direct.

III.

Causes submitted on written arguments will be disposed of without regard to their places on the docket.

IV.

Proof of the notice of appeal being served on the adverse party, must be made by copy of the notice with the

acknowledgment of service annexed, or by a return of the sheriff, or by affidavit of such service.

V

If an appeal is taken fifteen days prior to a regular term of this court, and the appellant fails to have the record filed with the clerk on the first day of the term, or if when taken within fifteen days of a term, he fails to have the case so docketed at the next succeeding term, the appellee by producing a certificate of the clerk of the district court from which the appeal was taken, stating that notice of the appeal had been duly served on him, and that the record had been prepared, may have the record filed and the cause docketed, and the appeal dismissed or the judgment affirmed as the court shall determine from the circumstances of the case.

VI.

If an appeal is taken at any time before a term of this court, the appellee may waive the notice of fifteen days and have the record filed, and cause tried at the first term after the appeal, unless the appellant show good cause for a continuance.

VII.

Errors must be assigned by the morning of the first day of the term, unless good cause be shown for the failure to do so, or unless the court by a special order extend the time.

VIII.

Assignments of error must not be vague and general, where the nature of the case will permit them to be otherwise, but must be explicit, and must point out with reason-

able clearness the objection to the judgment appealed from, or they will be treated as no assignment.

IX.

The court will regard those errors only which are assigned.

X.

If no joinder in errors be filed before the cause is regularly reached for trial, a general joinder will be regarded as having been put in.

XI.

All objections to form must be made before the cause is called for trial, otherwise they will be deemed waived.

XII.

Only two attorneys will be heard on either side except by special leave of the court, and the appellant will in all cases have the opening and concluding argument.

XIII.

In case of the death of a party, the same rules shall apply as are provided by law for cases in the district court, as far as those rules are applicable.

XIV.

Motions for *certiorari*, for diminution of record, must be in writing founded on affidavit, unless the record renders the fact apparent, or unless it is admitted by the adverse party. The application must be made at the first term after the appeal, unless sufficient cause be shown for the delay.

XV.

The opinions of the court must be immediately recorded by the clerk, the originals must then be placed in the hands of the reporter. As soon as they can be spared by him, they must be filed in the office of the clerk.

XVI.

All motions must be entered in the motion book, and shall stand over till next morning, after having been publicly called by the court, unless the parties otherwise agree.

JUDGES OF THE SUPREME COURT.

Hon. JOSEPH WILLIAMS, Chief Justice,
" JOHN F. KINNEY, Judge,
" GEORGE GREENE, "

CLERKS OF THE SUPREME COURT.

1st. Dist. James W. Woods, Burlington,
2d. " Alexander D. Anderson, Dubuque,
3d. " Thomas J. Given, Ottumwa,
4th. " George S. Hampton, Iowa City,
5th. " Lewis Whitten, Fort Des Moines.

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CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

BURLINGTON, MAY TERM, A. D., 1851.

In the fifth year of the State.

PRESENT:
HON. JOSEPH WILLIAMS,
HON. J. F. KINNEY,
HON. GEORGE GREENE.

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TAYLOR *et al. v.* GALLAND *et al.*

A party waves his objection to the ruling of the court on demurrer by amending his declaration to meet the objection, and going to trial on the merits.

Where a written contract appears on its face to be complete, it cannot be modified, varied or contradicted by parole proof; but if the writing seems to express only some parts of an agreement, parole evidence is admissable to prove other silent or doubtful parts of the contract.

Where a sheriff, nominally made plaintiff in connection with others who were the real parties in interest, was called upon to testify in behalf of the defendant, it was held that his testimony was admissable, but not so when called upon to testify in behalf of his co-plaintiffs.

A written contract made between parties to a suit to compromise and settle, is valid, even if made without any other consideration.

Taylor *v.* Galland.

A settlement of the cause of action in replevin by one joint defendant is a settlement as to all.

Torts such as die with the party cannot be assigned; but those affecting rights vested *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property may pass by assignment.

In a contract between B. and H., B. at the time performed his part of the covenants by executing a bill of sale, while H. was to perform his covenants in future in the management of a suit, &c., all of which were averred to have been performed by the pleadings—and not traversed—held that it was unnecessary to prove performance in order to a recovery.

When parties undertake to settle a legal controversy by assigning their respective conflicting claims to a third party in interest, a court of law will favor such assignment, so far as it can be done consistently, with established principles of law, even if such assignment does not amount to a technical release or accord and satisfaction.

ERROR *to Lee District Court.*

Opinion by WILLIAMS, C. J. Suit on replevin bond brought in the district court of Lee County to September Term 1849 at Keokuk.

Isaac Galland instituted an action of replevin against Peter Miller and others claiming to be the rightful owner of the Steam Boat Kentucky, which he alleged was unlawfully and against his right in the possession of the said Miller and others. He filed his bond in the sum of four thousand dollars as required by law with said Hughes and Rudd as his securities. The writ was executed by Hawkins Taylor the sheriff. The boat was replevined and delivered to the plaintiffs in the action by virtue of the bond in pursuance of law, on the thirteenth day of September, 1849. This suit was brought on the replevin bond by Hawkins Taylor, the sheriff, to whom the same had been given for the use of Daniel Baker from whose possession the boat had been taken by virtue of the replevin and delivered to Galland. He having failed to prosecute his action of replevin with effect; and having failed also to pay the damages assessed by the jury and adjudged by the court against him in said action, a trial was had and on the 13th day of February, 1850, a verdict was rendered in favor of the defendant. On the trial of the cause several questions of law were present-

ed and decided by the court. Exceptions were taken, and upon writ of error the case is brought for final adjudication to this court. The plaintiff below filed his declaration on the bond. The defendants pleaded *non est factum* together with a notice of special matter in defence of the action. The special matter set forth is as follows in substance: "That before the trial of the suit of replevin in the declaration mentioned between Isaac Galland—one of the defendants in this suit—and David S. Baker for whose use this suit is brought and others therein named as defendants said Ross B. Hughes one of the defendants in this suit purchased of said Galland all his title, right, claim and interest in and to the said boat Kentucky, her apparel and furniture. And also that said Hughes purchased of said Daniel S. Baker all his title, right, claim and interest, in and to said steam boat Kentucky, her apparel and furniture; the said steam boat Kentucky, being the boat in controversy in said suit of replevin so that before and at the trial of said suit in replevin and since, said Hughes owned and was possessed of the entire title, right, claim and interest of the said Galland and also the said Daniel S. Baker in and to said boat by regular and valid purchase and conveyance therefor which they or either of them had in said steam boat, her apparel and furniture. And also at the time of the purchase of said boat by said Hughes of said Baker as aforesaid, it was agreed upon between the said Hughes and the said Baker that said Hughes should have the entire control and direction of said suit of replevin so far as said Baker had any interest, or rights therein; that said suit if defended or prosecuted in the name of said Baker was to be prosecuted or defended at the risk and expense of the said Hughes and not of said Baker; and that said Hughes was to have and receive all the benefit, advantages and avails of the suit and was to indemnify and save harmless the said Baker of and from said suit and the costs and expenses thereof in all respects; that Hughes kept and performed his part of the agreement and in pursuance thereof, did by himself and counsel employed

by him represent said Galland, and also said Baker in the replevin suit aforesaid on the trial thereof. That said Baker recovered the judgment of three thousand dollars on the ground and by reason of said Baker's interest and title in said steam boat, purchased as aforesaid of him by said Hughes, and that said judgment was recovered by direction and under advice of counsel employed by said Hughes, representing said Baker's interest in said suit, that in fact said Hughes was as aforesaid, the owner of said Baker's title and interest in and to said steam boat. That said Baker did not during said trial of the suit in replevin, direct or control, or defend said suit, or take any part in the representing or protecting his interest therein, but that the said Hughes did the same at his own expense, and in pursuance of said agreement; and further that said defendant D. F. Rudd is only security in the replevin bond in said suit in replevin, and is now sued as such.

The plaintiff's counsel moved the court to strike the notice of special matter as filed by the defendant's counsel from the case on the ground that it furnished no bar or defence to the plaintiff's action; which motion was overruled by the court. To this ruling of the court, the counsel for the plaintiff took and filed an exception. Upon the finding of the jury in favor of the defendants, the counsel for the paintiffs filed their motion for a new trial.

To sustain the motion for a new trial the following reasons were assigned, viz:

1. The court erred in admitting improper testimony for defendant.

2. The court erred in refusing testimony offered by the plaintiff.

3. The court erred in its instructions to the jury and in refusing instructions asked by the plaintiff.

4. The verdict is against law.

5. The verdict is against the evidence.

6. The verdict is contrary to the instructions of the court.

7. The jury mistook the evidence and the law.

The court overruled the motion for a new trial and plaintiff's counsel excepted by bill filed.

The record shews that on the trial of the case in the court below after the plaintiff had offered and read in evidence to the jury the proceedings in the action of replevin and the judgment execution, &c: the defendants in accordance with the ruling of the court read in evidence the bills of sale of the steam boat Kentucky from Galland, the defendant, and Baker the plaintiff, in the replevin suit to Hughes who is security in the replevin bond and one of the joint defendants in this suit on the bond. To the introduction of which testimony the plaintiffs objected and excepted.

It also appears by the bill of exceptions in the case that the court permitted the facts contained in the notice of special matter accompanying the plea of *non est factum*, to be given to the jury in evidence, and that the plaintiff's counsel objected to the evidence thus offered and given to the jury on the ground that it was setting up a parole agreement to contradict the record—irrevelant to the issue —that it contradicted the written agreement. Exceptions are also taken and filed of record in the case to the instructions given by the court to the jury: but, as these instructions relate to and involve the same subject matters which are contained and presented in the other bills of exceptions touching the evidence, we will take them into consideration and dispose of them together, and as they are presented in the assignment of errors and the arguments.

The first error assigned is, "That the court erred in sustaining the defendant's demurrer to the plaintiff's declaration." The record shews that upon the judgment of the court below sustaining the demurrer, the plaintiff's counsel instead of standing upon his objection to the ruling of the court, amended his declaration and proceeded in the trial by jury on the merits. By doing so he waived all objections to the action of the court on the demurrer. This point has been heretofore settled and the doctrine well established.

The second assignment of error is "That the court erred in overruling the plaintiff's motion to strike from the file the matters contained in the notice under the defendant's plea." In connection with the subject matter of this assignment, we will consider that part of the third assignment which relates to the action of the court in allowing the verbal or parole testimony of the contract to go to the jury in evidence, and also the error assigned as to the instruction of the court to the jury on the same subject—the same questions of law arising upon each of them.

Does the matter contained in the notice furnish a legal bar to the plaintiff's action? If so it was proper that it should be pleaded and suffered to be proved as evidence for the jury in the case. The principle is well settled that where a written agreement has been executed between parties and manifestly purports to be an entirety—presenting a perfect contract concerning the subject matter thereof, it is the best evidence of what was agreed upon by the contracting parties. Such an agreement when executed cannot be modified, varied or contradicted by parole evidence of stipulations and agreements in regard to the same subject matters made before or contemporaneous with the execution of such written contract.

Where such contract appears on its face to be complete in its terms it is presumed to be the legal memorial of the understanding and intention of the parties thereto; and that by its execution they have mentally bound themselves to the observance and performance of its obligations: and that they are only to be held amenable to the law of the land governing it, which law enters into and becomes a part of it. The presumption is that if any thing more or less than such contract contains, had been agreed upon at the time or before, it would have been included therein, if the contracting parties meant to be bound thereby.

This rule is universally applied where the written agreement imparts a complete and perfect contract, expressive of what the parties had agreed upon. But exceptions to this

rule as well as to others of similar propriety, exist as to its application to written instruments generally. Where a writing seems to express only some parts of an agreement, parole evidence is admissable to prove the other parts, of which it is silent: or where a parole agreement is referred to without specifying its terms. In such cases the written agreement itself presents the fact that every thing which was agreed upon by the parties was not written therein and it leaves the contract referred to to be ascertained *aliunde* in accordance with the law of evidence. Cowen's and Hill's Notes on Phil. Ev. part 2, pp. 1471—1472; *Commissioners* vs. *McClement* 3, Pa. 122; *Sharp* vs. *Lipsey* 2, Bail 113.

However it is not absolutely *ascertained* that the written instrument itself shall contain within itself evidence rebutting the presumption that the agreement is complete and perfectly expressed. The writing may be and in the course of business often is executed for some specific end appertaining to the contract in carrying out its design—such as mere assurance or evidence of the transfer of the right to possess property or effects which are personal in their nature.

The case of *Jeffrey* vs. *Walton* 1st Starkie's Rep. 267, referred to in 3 Cowan's and Hill's Notes 1472, furnishes an illustration of the kind where the contract in writing was incomplete and *supplementary* matter by parole was allowed to be given on evidence as part of the agreement. On the same page of Cowan's and Hill's Notes on Phil. Ev. the case of *Knapp* vs. *Harden* is referred to, 1 Gale 47 Exch. H. T. 1835, where the price of goods sold was agreed on in writing by the parties and another arrangement was made, fixing the time of payment, it was there decided that the letter itself which fixed the price did not constitute an agreement, that it was not so meant by the parties. But the principle involved in the case at bar is settled we think by the court by decisions directly in point. "Where there is a writing importing a sale of personal property or any

other like instrument of transfer; it will not preclude the vendee from having an agreement between himself and the vendor cotemporaneous with the instrument and consistent with its terms that the value of the property should be applied to the payment of the defendant's debts. Parole evidence is admissible in cases of written instruments to procure collateral and independent facts about which the instrument is silent. *Hall* vs. *Maccomber*, 6 Gill and John 147, 157. *Kelsey* vs. *Dickson*, 2 Blackford, 236; 3 Id. 189.

In the case at bar the written instrument does not purport to be an agreement or contract in terms of stipulation as between the parties, but rather the result of the contract giving it effect, in due form of law, by passing and delivering the property which is the subject of the contract, to the purchaser. It is a mere bill of sale given to the party purchasing to enable him to take and hold the property which he had acquired by virtue of the agreement of sale. The bill of sale, instead of being the contract concerning the suit and the boat in controversy in it, we think must be considered as given by Baker in order to perform his part of the contract which had been made by parole between him and Hughes. In this view we think it cannot be properly taken as the only evidence of the contract. On the subject of verbal or parole agreements upon written contracts there has much been said in the books, and many decisions have been made. The rule as established seems to be that when the written instrument is incomplete or couched in terms so as to render it obscure or unintelligible; or where on its face it does not purport to be an entire contract between the parties but a new incident or result thereof parole evidence not varying or contradicting the writing, is admissible to prove so much of the contract as is not fairly ascertainable from the written instrument itself. In support of this doctrine we refer to 9, Picker. 298-9; *Monroe* vs. *Perkins* 3 Johns. 531; *Reed* vs. *McGreene*, 5 Ohio 384; 1 Greenleaf's Ev., § 302, § 203; 1 U. S. Dig. Supplt. 482 § 165;

Story on Contracts, 597-8, § 671. There can be no doubt as to the propriety of the general rule that written instruments of contract cannot be varied or contradicted by parole evidence of facts which occurred before or cotemporaneously with the execution thereof. To it there are however exceptions, some of which we have noticed. Moreover there are instruments in writing which may be termed contracts, but which operate for some special purpose in relation to a contract in order to render it effective, and which do not set out the particular terms and conditions of the agreement of the parties, concerning the subject matter of the writing. Of this latter class we think the bill of sale here is an instance. The ruling of the court below in admitting in evidence to the jury the bill of sale and the parole evidence of the contract to which it related, was correct.

The plaintiff in error also contends that there was error in permitting the legal plaintiff, Hawkins Taylor, to testify on behalf of the defendants below.

Taylor being the officer who executed the writ of replevin which issued at the suit of Galland, and to whom the bond on which this suit is brought was given by the defendants in this action, is only the legal plaintiff. He sued for the use of Baker. He had no interest in the suit except that he was liable for the costs. We cannot see what valid objection could be raised to him as a witness, called to testify on behalf of the defendant. The interest arising from his position in the suit is such that it could not effect his testimony so as to exclude it; for he was called to swear against such interest. This objection to the proceedure of the court below, although formally raised, was not seriously urged. We find no error here. That the court refused to allow Taylor to testify for the plaintiff is also assigned for error. As he was the legal plaintiff, and liable for costs in the event of a failure to recover in the action, he could not be allowed so to testify.

But it is alleged that the agreement made between the parties because it is without consideration, is not good in law. To this we answer, that the parties to the agreement were plaintiff and defendant, in action at law; they had a right to compromise and put an end to the litigation pending between them. That Hughes was a co-defendant with others in the suit on the bond, could make no difference in the matter. An extinguishment, or settlement of the cause of action by one joint defendant, estops the plaintiff in the action as to all of them. Besides, by the contract Hughes agreed to indemnify Baker, and save him harmless in any event of the suit, and took upon himself all the responsibility of paying counsel and managing the cause to its termination, at his own expense and trouble. By this Hughes assumed new liabilities and responsibilities, which in effect accrued to the benefit of Baker; and therefore a good consideration in law was created, to sustain the contract.

A new and additional obligation beyond what existed in the relation which the parties held to each other by reason of the original bond and the action upon it, raised a good consideration, for the contract, upon which the defence is set up.

It is alleged also, that the matter assigned is in the nature of a tort, and is not in law assignable. If the action were strictly personal, so that it died with the person and abated, the objection might be available. But this is not the case; the subject matter in controversy consisted in property of a substantial specific, and tangible nature, susceptible of actual possession and value; capable of being considered and rendered as assests or effects, such as would directly by operation of law upon the decease of the rightful owner, go into the hands of his administrator. Such being the case, it was such a chose in action as was legally assignable; 1 U. S. Dig. 503, § B. 14; Story on Contracts, § 583; 19 Wend. R. 73; 1 Peters R. 213, 3 Cowan, R. 643.

In general mere personal torts, such as die with the party cannot be assigned; but rights vested *ad rem*, and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property may pass by assignment.

Then, is the defence set up, a good bar to the action in law? It is contended that it is not, because the defendant Hughes did not show performance of the contract on his part. To decide this question, it is only necessary to look to the contract. What is the intention of the contracting parties there manifested? Are the covenants mutual and dependant or independant? Clearly they are independant. Baker in direct terms parted with his right and claim to the boat, and the damage for dispossessing him of it, together with his interest in the bond sued and in action.—It cannot be pretended that Hughes was to perform his part of the contract cotemporaneously with that of Baker; or that in any respect the covenants of the parties to the contract were mutual and dependant. Baker completed his at the time of the making the contract, by executing a bill of sale for the property in controversy; and Hughes was to act *in futuro* in the management of the suit to its final disposition at his own risk; and in any event to save Baker harmless; all of which he averred he had performed.—When such is the nature of the contract, it is unnecessary to show performance in order to a recovery. 11 Pickering R. 154.

The last and only question which we deem it necessary to consider, is as to the sufficiency of the matter of contract, contained in the notice annexed to the plea of general issue. Is it a good bar to the plaintiff's action on the bond? We think it is. The statute provides "that the defendant may plead specially or may plead the general issue, and give notice in writing under the same, of the special matters intended to be relied on for defence on the trial, under which notice if adjudged by the court sufficiently clear and explicit the defendant shall be permitted to give evidence of the

facts therein stated, as if the same had been specially pleaded and issue taken thereon." Rev. Stat. 470, § 12. The notice as filed with the general issue, sets forth that Hughes, one of the securities in the bond and co-defendant, with Galland, the principal, and Rudd purchased from Baker—the plaintiff in the suit on the bond and claimant of the boat in there plevin suit—all his interest in and title to the boat; that he also bought Galland's interest, who was the plaintiff in the replevin suit and principal obligor in the replevin bond here sued. By these contracts he became the owner of the interests and claims of both the contending parties, who stand in the relation of plaintiff and principal defendants in this suit. Thus both interests become united in one right in him, by the assignments from Parker and Galland. This in effect, compromised the suit and ended the strife, so far as these parties are concerned in the action upon the bond, by extinguishing the liability thereon to Baker. This we think is the simple state of the case. But, it is contended that all this does not operate in law as a valid release, nor yet as accord and satisfaction, and therefore cannot bar the action. Much has been urged upon these points, all of which we have considered. However, if parties involved in legal strife undertake to put an end to controversy by a contract of sale, thereby assigning the interest of the one to the other, in good faith, and thus merge the two conflicting claims or interests into one, we cannot see why the courts of law will not enforce the contract, and protect the assignee of the claim or interest against the attempt of the assignor to proceed with his action. Courts of law following in this respect the rules of equity, will take notice of assignments of choses in action in order to afford them every support and protection, not inconsistent with the established rules, principles and modes of proceeding which govern tribunals acting according to the course of the common law. Where a chose in action is thus assigned by the owner, he cannot interfere to defeat the rights of the assignee

in the prosecution of the suit to enforce those rights. *Mandeville* vs. *Welch*, 5 Wheat. 277; *Corser* vs. *Craig*, 1 Wash. C. C. R. 424; here Baker had assigned all his interest in the replevin suit, wherein he and Galland were parties plaintiff and defendant, and which involved the right of ownership in the boat. The bond sued upon in this action was part of the legal proceedings therein given by Galland and his securities—one of whom Hughes is—to secure to Baker the property or its value in damages, if he should obtain judgment against Galland. Hughes in the stead of Baker, by virtue of the assignment carried on the suit to successful termination. The suit and bond accrued to the benefit of Hughes. We think that this contract operated to extinguish all Baker's interest in and right to the benefit of the bond; and of course his right to maintain an action on it was extinguished. The liability of the defendants was by the contract discharged.

It is our opinion that the matter contained in the notice was a good bar to the action, and was properly admitted in evidence by the court below. This agreement being a full and entire transfer of all the rights and interests of Baker in and to the boat, and the suit then pending to Hughes, one of the three co-defendants and co-obligors in the bond, without any reservation as to the other two, it operated as an extinguishment of the obligation of the bond as to them all. 18 Pick. R. 414. In legal effect the agreement was a compromise, and operated in the nature of a release to Hughes of Baker's interest in the suit, and its incidents so far as it effected Hughes, of which the bond was an important part.

The rule of law is that a release or relinquishment of indebtedness as to one of two joint or joint and several debtors is in legal operation a discharge of all.

The debt being entire and when once satisfied and released it cannot be enforced against any party to it. *Tuckerman* vs. *Newhall*, 17 Mass. R. 581; *Wiggin* vs. *Tudor*, 23 Pick. R. 444; 2 Metcalf R. 381,407.

What we have said is a substantial disposal of the exceptions taken to the instructions of the court to the jury. We find no error in them.

As to the error assigned that the court overruled the motion for a new trial, we have only to say that the evidence was properly submitted to the jury. It was for the jury to dispose of the facts of the case by their verdict. This they did. The court could not interpose with their province unless good and cogent reason for such interposition existed; but would presume that they acted on the proof adduced in the case, and that such proof was sufficient to warrant the verdict. We find no error here. After a full hearing and examination of this case, in view of what we conceive to be the just and legal rights of the parties and the proper administration of the law, we are of the opinion that the judgment of the court below should be enforced.

Judgment Affirmed.

L. R. Reeves, for plaintiffs in error.

Geo. C. Dixon, for defendant.

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HUGHES *and* ROBINSON *v.* HOLLIDAY.

Where a deed purports to have been made by virtue of a power of Attorney, it is incumbent on the party offering it in evidence, to produce the authority upon which the deed was executed.

In an action of right, where the plaintiff proved himself entitled to only two-thirds of a lot, the verdict should correspond with the evidence, and not be general for the plaintiff. Rev. Stat. 530; § 33-4.

A person owning an undivided interest in land may recover to the extent of his interest in an action of right.

Hughes v. Holliday.

Where the evidence shows that the plaintiff held title to only two-thirds of a lot, the court should, when requested, instruct the jury that he could only recover to the extent of his proof.

ERROR to *Lee District Court.*

Opinion by KINNEY, J. Action of right commenced by Holliday against Hughes and Robinson, to recover possession of lot six, in block fourteen, in the city of Keokuk.

The declaration contains but one count and claims the lot in fee. Defendants pleaded the general issue. A trial was had and a verdict returned in favor of the plaintiff.

From the bill of exceptions, taken from the defendant below, it appears that the plaintiff, in order to establish his title, offered in evidence a deed from Le Claire—who drew under the decree in partition—to Robert A. Clark, William A. Clark and John C. Ainsworth, conveying the lot in question, and also a deed to him from said William A. Clark and John C. Ainsworth, executed by them from said Robert A. Clark by William A. Clark, his attorney, dated December 4, 1846, without producing or showing any power or letters of attorney from said Robert A. Clark to William A. Clark. The defendant objected to the introduction of the deed of Robert A. Clark without evidence that W. A. Clark had the power to make said deed, but the court overruled the objection and admitted the deed, to which the defendant excepted.

The defendant then asked the court to instruct the jury that the plaintiff having declared for the whole lot, but only having shown himself entitled to two-thirds, that he could not recover. Also that the plaintiff having shown title in himself to two-thirds, can only recover to the extent of his proof, both of which the court refused, and instructed the jury that the plaintiff could recover the whole lot against the defendant, who had not shown any title.

The jury returned a verdict under these instructions that the right of possession and right of property to the lot, were

in the plaintiff. By the judgment of the court the immediate possession in fee simple was given to him.

That the court erred in admitting the deed from Robert A. Clark to the plaintiff, without proof of the power of attorney from him to William A. Clark to make it, is not seriously controverted by counsel for defendant in error. There was no evidence that such power ever existed. The deed purported to have been made by virtue of a power of attorney, and it was incumbent upon the party offering it, to produce the authority by which the deed was made, in order to lay the foundation for the introduction of it as evidence. This was necessary also, so that the court might judge whether the power was sufficient in form and substance to authorize the attorney to perform the act. If the letters of the attorney did not possess the necessary requisites to enable Clark to make the conveyance, or if it had appeared that they were defective, for want of the usual acknowledgment, or if from them it had appeared that the power delegated had not been strictly pursued, the deed could not be admitted; and this could only be ascertained by an exhibit of the letters of attorney, or a copy from the records. Rev. Stat. 209, § 32-3. Also, 1 Mc Lane, p. 2; 1 Wend. 431; 2 Hill's abridg. 267, § 21.

But this point is not urged by the defendant in error. It is claimed however that he had a right to recover the entire lot, although he proved title in himself to only two-thirds. That as the defendant below had no title, the plaintiff could recover as against him the whole. This position has been insisted upon with much ability, and many authorities have been cited in support of it, but we think the decision of the question presented, depends mainly upon a construction of the statute. Rev. Stat. 530, § 33, provides, "if the verdict be for a part of the property claimed, it should specify particularly what part, if for an undivided share or interest in the whole property claimed, or in any part thereof it shall specify what share." The plaintiff below proved an inter-

est to an undivided two-thirds of the lot, and by this section he is allowed to recover such interest. The legislature have given a remedy for just such a case as is here presented. The verdict should always correspond with the evidence. There was no uncertainty about the evidence introduced by the plaintiff. He showed a perfect title, to an undivided two-thirds, and if the court had instructed, that the plaintiff could only recover to the extent of his proof, the verdict would have been for the quantity to which the plaintiff showed title.

But it may be said that the verdict must follow the declaration as provided in the following section. Not however, we would remark, unless the evidence corresponds with the declaration. If the party declares for more than he can prove himself entitled to recover, he can only recover to the extent of his proof: "When the verdict follows the declaration, it may be general for the plaintiff, and judgment shall be rendered according to the verdict." Rev. Stat. § 34. This can only be done when the verdict is authorized by the proof. The judgment it is true must follow the verdict, but it is equally true that the verdict must correspond with the evidence. If this were not so, a party would be permitted to supply with allegations in his declaration what he would lack in testimony. It is no justification then for the verdict that the plaintiff declared for the whole lot. He was only entitled to a verdict to the extent of his testimony. Rev. Stat. § 45 provides that "the plaintiff can only recover upon the strength and validity of his own title." By permitting him to recover the entire lot, he necessarily recovers upon the validity of the title of his co-tenant to one-third. The evidence showed that Robert A. Clark owned an undivided interest of one-third. But it is said that the interest of the plaintiff attaches to each and every foot of the entire lot. This is true, but that does not give him title to the whole. Clark's interest attaches in the same way, and in this respect is equal to the plaintiff's and yet he really owned

but one-third. If the plaintiff owned an undivided one-hundredth part of an interest in the lot, that interest, so long as it remained undivided, would attach to the lot as an entirety. But in an action of right he could not recover the entire fee simple title to the lot. His title would be good to the extent of his interest, but such interest would not justify a recovery of the fee to the ninety-nine interests owned by his co-tenants. The analogy, in principle, is the same where the interest is greater. The statute clearly contemplates the right of the plaintiff to recover an undivided share or interest; for the 14 § provides, that if "an undivided share or interest is claimed, the same shall be set forth in the declaration." Why these provisions in relation to an undivided interest, if the legislature did not intend to give a remedy to persons holding such interests? Why permit a person to declare for an undivided part, if he could not recover a verdict for such part? And why require a judgment in all such cases to follow the verdict, if it were not the object to give the plaintiff the benefit of the verdict, for the interest he had shown himself entitled to by his proof?

The statute having prescribed the manner of bringing suit, in case of an undivided interest, does it not follow as a necessary corrolary that a person with such interest cannot recover the fee to the whole? It appears to have been the intention of the legislature to provide a remedy, and that remedy is not a recovery of the fee to the entire tract or lot, but a recovery of the interest to the extent owned.

But it may be asked how is the plaintiff to be put in possession, unless he recovers the whole? The legislature certainly has not provided a remedy, without having also provided that the party entitled to it shall have the enjoyment of it. If this instruction of the court had been correct, the verdict would have been in favor of the plaintiff for an undivided two-thirds of the lot. Judgment would have been rendered in pursuance of the verdict, and the plaintiff would have been entitled to a writ of possession, for an undivided

two-thirds. This interest as we have said attaches to the whole. As against a stranger, he would have the right to the entire possession. Without such possession, he could not enjoy the interest which he owned or the benefit of the judgment obtained. The sheriff could not designate by metes and bounds, neither could any one, an undivided two-thirds. The plaintiff would be as much entitled to one part of the lot as another, and if a stranger occupied a single foot of it, he would be in possession of a part covered by the interest, owned by the plaintiff, and to which possession was given him by the judgment of the court. Unless the plaintiff could be put in possession of the whole, the statute in relation to the recovery of undivided interests would be a mockery. For it would assert the right of the party to recover a verdict to the extent of the interest proved, and would require the court to render judgment in pursuance of the verdict, but that judgment could not be executed. It would not be in the power of the sheriff to locate an undivided two-thirds; and because this could not be done unless the officer could give entire possession as against a stranger, the trial verdict, and judgment would all have been for no purpose. The sheriff would find, for the first time, that the judgment of the court possessed no vitality, and that the aim of the officer in executing his writ was entirely powerless. We do not think that the statute opens the door for the recovery of a judgment, and at the same time closes it against a recovery of possession. The writ of possession must follow, and execute the judgment. If an undivided interest is recovered, the plaintiff must be put in possession of that interest, and as it attaches to the lot as an entirety, he must be put in possession of the entire lot, otherwise the judgment is not executed. This possession he holds in his own right, and subject to the rights of his co-tenant. This view of the statute is in perfect harmony with the 2 §, which provides that "no person shall recover in this action, unless at the time of commencing it, he shall have had a valid and

subsisting interest in the property claimed, and the right to recover the immediate possession thereof." The plaintiff in this case had a valid subsisting interest in the entire lot, and with such interest had a right to bring his action, and recover.

We conclude then, in the first place, that a person with an undivided interest, may bring an action of right, and recover a verdict and judgment. Second, that with such interest, he does not recover a verdict and judgment for the fee simple of the entire estate, nor for the possession thereof, but merely for the interest proved, and that possession is a necessary incident to, or result of the verdict and judgment, and must be held subject to the rights of his co-tenant. Third, that the court erred by not giving the instruction to the jury, asked by the defendant below that "the plaintiff only having shown title in himself to two-thirds of the lot, could only recover to the extent of his proof." Fourth, by permitting the deed from Robert A. Clark to be introduced without evidence of the power of attorney authorizing William A. Clark to execute the conveyance from Robert A. Clark. Fifth, by not granting a new trial as the verdict of the jury found the right of property to the entire lot in the plaintiff, and for entering up a judgment in his favor, establishing in him the fee simple title.

Judgment reversed.

George C. Dixon, for plaintiffs in error.

Johnston and *Mathews*, for defendant.

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HALL *and* COCHRANE *v.* SAVILL.

Record evidence and even parole proof are admissible to show that a deed absolute on its face should have no greater effect than a mortgage.

Where a deed was given to secure the payment of money, and a bond was given to reconvey on payment of the money, the deed should have no greater force than a mortgage as between the parties to the transaction and their agents and attorneys if they were actually cognizant of the facts.

The form of a deed absolute should yield to the substance of the contract, as between the parties, and all others who had actual notice of it and have not been misled by the form.

The mortgager is considered the owner of the land, subject only to the lien of the mortgagee.

ERROR *to Lee District Court.*

Opinion by GREENE, J. J. C. Hall and W. J. Cochran commenced this action of right against Robert Savill for the north-east quarter of the north-west quarter of section thirty-four, in township sixty-nine, north of range six, west of the fifth principal meridian. Plea, general issue. Verdict and judgment for the defendant.

On the trial the plaintiff gave in evidence:

1. A Register's certificate, showing that the land in question was entered March 16, 1840, by Alexander H. Walker.

2. A deed from said Walker dated September 24, 1844, conveying the land to John, Joseph and Robert Savill.

3. A deed, dated November 4, 1844, from Joseph and Robert Savill to William G. Walker.

4. A sheriff's deed conveying said Walker's interest in the land to the plaintiffs.

5. They then gave evidence tending to prove that defendant was in possession. Also, evidence proving the death of John and Joseph Savill, and that John Savill was the father of Joseph and Robert.

Defendant then introduced the judgment from which the plaintiffs derived their sheriff's deed. The judgment was

rendered May 25, 1847, in favor of Michael Sellers against William G. Walker, in which Cochran and Hall were attorneys. The garnishee process issued in said case, with Joseph Savills answer thereto, was also introduced. The answer shows that Joseph Savill and his brother Robert jointly borrowed of William G. Walker one hundred dollars, for which they were to pay interest at the rate of twenty per cent per annum, and in order to secure payment they executed the deed to said Walker, and at the same time took a title bond, conditioned that if Savills should pay to Walker one hundred and twenty dollars in one year, or twenty dollars at the end of one year and one hundred and twenty dollars at the end of two years from date of bond, then Walker was to reconvey the land in question to Savills. At the date of the answer, April 7, 1846, no part of the money had been paid by the Savills to said Walker.

Defendant then introduced the bill, answer, exhibits and decree in a chancery case commenced by Joseph and Robert Savill against said W. G. Walker. The bill was filed by one of the plaintiffs, W. J. Cochran as solicitor for the Savills, September 6, 1847, and alleges that the deed made by them to Walker was in the nature of a mortgage, and that they had always been ready to pay according to the stipulations of the bond which was executed on the same day with the deed; that Walker had left the county and had no agent to whom payment could be made; that one of them had been garnisheed on attachment in the case of *Sellers* v. *Walker* and discharged, and that they were both garnisheed on an execution issued from the judgment in that case; and that they had brought the money into court. The bill prayed for a decree of title to the land. An amended bill was filed May 1, 1848. Bill was confessed to be true and a decree rendered agreeable to the prayer of complainants.

Defendant also gave in evidence a deed from said William G. Walker and wife, conveying the land to Joseph and

Robert Savill. This deed was dated April 21, 1846, and filed for record April 21, 1848. The plaintiffs objected to the evidence offered by defendant, but the court overruled the objection, and instructed the jury that the evidence submitted did not show any title in the plaintiffs.

The first four errors assigned are to the ruling of the court in admitting the evidences of title introduced by defendant below. This evidence comprises the judgment, the garnishee process, the chancery proceedings and the deed. This evidence has an important bearing upon the case and clearly discloses the nature of the transaction between the parties. The records offered are unexceptionable in authentication, were relevant to the issue, and therefore admissible.

The evidence was introduced for the purpose of defeating plaintiff's claim of title by showing that the deed from Joseph and Robert Savill to William G. Walker should have no greater effect than a mortgage; that the plaintiffs had notice of its character before judgment was rendered against Walker, and that they purchased with full knowledge that the deed, though absolute in terms, was in reality a mortgage; that the deed was given by the Savills to secure the payment of money they had borrowed from Walker who gave a title bond to recover the premises upon the payment of the money within the time stipulated. These facts are clearly established by the records and parole proof. It is conceded that as between the parties to the conveyance it should be treated as a mortgage, but claimed that it cannot be so regarded in its application to third persons. This is true, if such third persons are strangers to the contract. Without notice they should not be prejudiced by any private arrangement, not expressed in the deed. But in this case the plaintiff had notice. It appears of record that one of them acted as solicitor for the Savills in the chancery suit to enforce a reconveyance of the land, and both of them acted as attorneys in the suit at law. In these suits the

mortgage character of the deed was fully disclosed, and was to the plaintiffs the same as actual notice that the grantee, in form, was nothing more and acquired no greater rights than a mortgagee in fact. With such notice the plaintiffs cannot complain that they were misled by the absolute form of the deed. They were as well acquainted with its real character, as were the parties themselves. The form then should yield to the substance of the contract, and confer no greater legal benefits upon the plaintiffs than was intended by the parties in the deed, nor greater than could be enforced by the grantee.

In *Walton* v. *Cranly*, 14 Wend. 63-67, it was decided that even parole evidence is admissible to show that a deed absolute in its terms, was intended as a mortgage; and that such evidence may be received not only as between the parties to the instrument, but when third persons are concerned, if they have not been mislead by the form of the transation. It is well settled that parole evidence is admissible to show that an absolute deed was intended as a mortgage; 2 Vesey 225; 1 John Ch. 594; 2 ib 189; 4 ib. 167; 6 ib. 417; 2 Cowen 324,247; 1 Monroe 73; 1 Day 139; 1 Paige 48,56,77; 8 Wend. 641; 9 ib. 227,232; 2 Hall's S. C. 1,13; 4 Kent's C. 142; 15 John. 205; 18 ib. 173. Most of these were cases in which the defeasance had been omitted in the deed by fraud or mistake, and in that particular not analogous to the case at bar. But if parole evidence is admissible to establish a mere parole defeasance, the propriety of the record evidence cannot be questioned in the present case to show that in connection with the deed there was a bond executed, containing conditions on the performance of which the deed would be defeated, and a reconveyance of the estate secured to the grantor. As between the parties, the bond was executed as a defeasance of the deed, and so as to third persons with actual notice of the transaction.

The object for which a deed is given must be regarded as the true test of its character. If a deed is given as a secu-

rity it is a mortgage, although an absolute conveyance in form. Wright O. 249; 4 Dev. 59; 2 Pick. 211; 15 John 205; 3 Hill 95; 2 Grant. 132; 6 Blackf. 113; 4 Pick. 349. The fact that the deed in the present case was given as security is conclusively established by the evidence, and was known to the plaintiffs before they purchased. But it is claimed by counsel that the bond as a defeasance to the deed was no better than an unrecorded deed against a judgment creditor, and as a judgment would operate as a lien against such unrecorded deed,—*Brown* v. *Tuthell*, 1 G. Greene—so would a judgment operate against an unrecorded title bond. This position will not be questioned. The principle would prevail against all who had not received actual notice of the bond as a defeasance to the deed. The plaintiffs had such notice, and therefore purchased subject to the defeasance, with the same effect as if they had purchased against a prior unrecorded deed with actual notice.

Again, it is claimed that if Walker should be considered as mortgagor he still had a "conditional fee" on interest in the land which could be sold. Doubtless the amount due from the Savills to Walker might have been secured by proper process, to apply on the judgment against Walker, but obviously that could not be done by selling land owned by the Savills, on an execution against Walker. The mortgagor of land has generally been considered the owner, subject only to the lien of the mortgagee. *Walton* v. *Cronly*, 14 Wend. 63-66; and cases cited. The rights and interest of the mortgagor do not pass to the mortgagee until he acquires possession. The mortgage before entry and foreclosure is deemed a pledge or charge upon the land, and subject to that lien the legal rights and remedies of others may be asserted and enforced in the same manner as if no such mortgage existed. *Wellington* v. *Gale*, 7 Mass. 138; *Taylor* v. *Porter*, ib. 355; *Goodwin* v. *Richardson*, 11 ib. 469,473; *Eaton* v. *Whiting*, 3 Pick. 484; *Blanchard* v.

Brooks, 12 ib. 47; *Fay* v. *Cheney*, 14 ib. 399; *Collins* v. *Torry*, 1 John. 277.

We conclude then that the court below did not err in admitting the evidence offered by defendant in this case; nor in charging the jury that the evidence did not show title in the plaintiffs.

Judgment affirmed.

J. C. Hall and *A. Hall*, for plaintiffs in error.

H. T. Reid and *L. R. Reeves*, for defendant.

Hummer *v.* Hummer.

The Legislative act of January 19, 1839, confers jurisdiction upon the district court over the property and persons of insane persons, and similar powers are conferred upon the probate courts, by the act of January 14, 1841; held that the jurisdiction of these courts is rendered concurrent.

Where two statutes, passed at different terms in relation to the same subject matter, the subsequent act does not repeal the former, if both can be made to harmonize.

The jurisdiction of a Superior Court, can only be taken away by express words of repeal, or irresistable implication.

Error *to Lee District Court.*

Opinion by Williams, C. J. This case was presented to the district court of Lee County, at Keokuk, at January term, 1851, upon the relation of Emeline Hummer wife of Michael Hummer. The necessary process was issued, and upon hearing had, the jury found Michael Hummer to be insane. Judgment was accordingly entered and guardians were appointed to take charge of the person and estate of the said Michael Hummer. The case has been brought to this court by writ of error.

The only question for decision here is, as to the jurisdiction of the district court. The legislature of Iowa, by the act entitled "an act concerning insane persons," approved January 19, 1839, expressly gives jurisdiction of the matter to the district court.

It enacts, that "when any district court in this territory shall receive satisfactory information that any person in their respective counties having property, is or has become insane, it shall be the duty of said court to direct the sheriff of the county to summon twelve intelligent and disinterested men of the county," &c. It then proceeds to prescribe the mode of proceeding; and upon the finding of the jury, that the person is insane, directs that the court shall appoint three suitable persons as guardians, to take charge of the person and estate of such insane person, &c. An act was also passed by the legislature and approved January 24, 1841, which provides, "that the several probate courts in their respective counties in the territory, shall have power to appoint guardians to take care, custody and management of all insane persons, who are incapable of conducting their own affairs, and their estates, real and personal," &c. It then proceeds to make provision for the information, mode of procedure, to judgment, the payment of costs, the appointment of one person to take charge of the person and estate of such insane person; and it provides, that the guardian shall file bond for the faithful performance of his duties; that he shall, when requested, render an account of his guardianship, &c., &c. The latter act prescribes the duties of the guardian in detail, in order to the full discharge of his trust.

The 29th section of the act, provides "that all acts and parts of acts contravening the provisions of this act, be and the same are hereby repealed.

It is contended by the counsel of Michael Hummer, who resists this application and seeks to set the judgment of the

district court aside, that this latter act, actually and constructively repeals the act of January 19, 1839.

The power to act in cases of lunacy or persons *non compos mentis*, is given to both courts. The first in express terms empowers the district court to act: and the latter imparts the like power to the probate court. Then do the enactments conflict? Are they materially inconsistent or repugnant? Or does the latter repeal the former?

After a careful examination of these questions, in view of the several acts, and by the rules of the law, which test the matters involved, we answer in the negative. By the several acts, each of the courts is authorised to act in protection of the persons and estates of insane persons. The power imparted to each, is the same. The first enactment provides, that the district court shall appoint three suitable persons as guardians of the person and estate of the insane person. The last enactment provides for the appointment of but one guardian. The district court is not required in express terms to take bond from the guardians for the faithful performance of their duty. By the latter act, such bond is required of the guardian. In the act conferring jurisdiction on the probate court, the mode of procedure is more particularly prescribed than in the other; but as to this, that procedure is substantially the same as that which is practiced by the district court, in such case, in accordance with the rules of that court. In matter of substance the acts are not inconsistent with each other, nor are they repugnant in their provisions. The rights and interests of the subject of the law, and those concerned, are guarded, protected, and enforced, by the provisions of either act. There can be no doubt that if two enactments, on the same subject, materially conflict, so as to be irreconcilable in their terms, and repugnant to each other, it becomes the duty of a court of law to decide upon such a case, being properly presented, which shall be in force. In such case the enactment of most recent date, will supercede the older one. But

such is not this case. The case of *Laughton* v. *Wallace* 9 New Hamp. R. 59, and the other cases, relied on by the counsel for Hummer, are of that class, which establish the doctrine that "where the design to revise a statute clearly appears, the former are to be considered as no longer in force, though not expressly repealed." The principle inculcated by these authorities is sound, and we recognize it as such; but we do not think that the design to revise and repeal the former statute "*clearly appears.*"

Courts of law will if possible so construe statutes, as to give them effect, where they relate to the same subject matter. It is also a rule well established, that repeals by implication of law are not to be favored *Goddard* v. *Boston*, 24 Pick. 299; *Lake* v. *Brookline*, 20 Pick. 407; *Haynes* v. *Jenks*, 2 Pick. R. 172. And also that "two affirmative statutes being on the same subject, the latter does not repeal the former if both may consist together;" 4 Gilman 221; 9. Cow. R. 437. "Both must stand together if possible."

The district court in this state, possesses the jurisdiction which is conferred upon those courts which are designated as superior. It has been decided that the jurisdiction of such courts can only be taken away by *express words* of repeal, or *irresistible* implication; 8 Pick. 453; 1, U. S. Dig. § 630, and cases referred to. If the principle contended for by the counsel for the defendant, in this proceeding were to prevail, it would fully controvert the doctrine established by this court in reference to the jurisdiction of the district court, and of justices of the peace where the sum in controversy is less than one hundred dollars. By the justice's act, jurisdiction of cases where the sum in controversy does not exceed one hundred dollars, is expressly and in direct terms given to the justice of the peace. By previous law, the district court is vested with jurisdiction in general terms, without a minimum limit. On the question of the jurisdiction of the district court, as to any sum under one hundred dollars, this court decided that the jurisdiction of these two

courts, in cases where the amount in controversy is under one hundred dollars is concurrent.

The act of January 14, 1841, concerning insane persons, does not expressly repeal the previous enactments on the same subject, approved January 19, 1839. It only repeals so much thereof as may be deemed as "contravening" the provisions of that act.

It is contended that inconvenience will be experienced, if both acts are to be considered in force, from a conflict of jurisdiction. That both courts may be called upon to exercise jurisdiction in the same case by different persons claiming the right to give information, and requiring the interposition of the law, in case of an insane person. This could not be; for a proceeding having been commenced in either court, and jurisdiction of the case having been thereby assumed, in accordance with the law, the other would be legally precluded from taking cognizance of it.

This principal of jurisdictional procedure has long since been promulged, and is well established.

As there is nothing in the first act, which contravenes the provisions of the latter, so as to render them repugnant, as to the exercise of jurisdiction of the subject matter by the district and probate courts; and as the act of January 14, 1841, by its 29th section only repeals all acts and parts of acts "contravening" its provisions, it is the opinion of the court that, as the law now stands, in virtue of these two enactments, the jurisdiction of the district and probate courts is concurrent.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

R. P. Lowe, for defendant.

ABEL *et. al.* v. KENNEDY *et. al.*

An application for a new trial on the ground of misconduct in the jury, should be overruled if supported alone by the affidavit of jurors.
Jurors cannot impeach their verdict upon their own affidavits.

ERROR *to the District Court of Lee County.*

Opinion by KINNEY, J. This was a proceeding under the statute against the steam boat Ocean Wave, commmenced by Kennedy and Blair for the use of John G. Kennedy. The defendants in error obtained a verdict against Barton Abel, master of said boat, upon which judgment was rendered against him, and Hughes and Haight his sureties. The defendant below made a motion for a new trial, alleging for cause that the deposition of A. F. W. Webb, taken by the plaintiff below, and which was ruled out and refused to be given by the court to the jury was by one of the attornies for the plaintiff handed to some of the jurors, and by them read during the trial, and that after the jury had retired to consider upon their verdict, the jurors had said deposition and perused the same. The motion also alleges that part of said deposition was left in the court room after the adjournment of the court, and before the jury agreed they went into said room to consider their verdict, where they obtained and read the same.

In support of this motion, the affidavit of Martin the constable, who had the jury in charge is produced and also that of W. P. Hathaway one of the jurors who tried the cause. Martin swears, that after the court adjourned in the evening the jury occupied the court room, and that he went into the court room and found the deposition of Webb, in the hands of one of the jurors, which affiant believed to have been left in the room, which he immediately took from the juror. Hathaway swears that a part of the deposition of Webb was

found in the desk of the Judge, and that it was read by the jurors. The plaintiff below introduced the counter affidavits of jurors, Hathaway, Vandyke, Schwartz and Jackson. Hathaway in his affidavit, swears that the deposition had no influence on the jurors; Vandyke testifies to the same; Schwartz, that all of the jurors except Hathaway had agreed on their verdict before they were conducted into the court room, where the deposition was found; that the deposition was taken up by Vandyke who looked at it and handed it to Jackson; that said deposition was not read loud, and that it had no influence on affiant, and thinks it could not have influenced the other jurors. Jackson swears to the same, and that the deposition did not have any influence upon him in making up his verdict.

Upon this showing, the court refused to award a new trial, and entered a judgment on the verdict. The refusal of the court to grant a new trial is assigned for error.

The motion was properly overruled. The testimony embodied in the bill of exceptions is briefly this. The deposition of Webb had been ruled out, and part of it left in the court room. After the jury had consulted on their verdict and all agreed except Hathaway, they were reconducted into the court room where a part of the deposition was found and seen by two of the jurors who had formed their verdict. The deposition was not read loud nor read at all by the juror Hathaway, who had not made up his mind. Those who did read the deposition could not have been influenced by it, as they had agreed upon their verdict. It was not possible for the deposition to have influenced Hathaway, as he neither read nor heard it. This then from the showing of the jurors does not exhibit such a misconduct upon the part of the jurors as would be sufficient to authorize the court to gran at new trial.

But it has been said and authorities cited to sustain the position that jurors cannot tell how much influence the reading of a deposition or improper paper may have had upon

their minds, and that if they testify that they were not influenced, the court will presume otherwise. We are not disposed to controvert this position in cases where it was possible for the jury to be improperly influenced after they had retired to make up their verdict. But in this case, the jurors not only swear that they were not influenced, but to the fact that eleven of them had agreed, and the other juror Hathaway not having read the deposition, all possible presumption of influence on his mind is rebutted.

If the eleven jurors had not agreed upon their verdict or if Hathaway had read the deposition the case would have been entirely different and on a proper showing—not by the affidavit of the jurors—the court should have granted a new trial, although the jurors may have sworn that the reading of the deposition did not influence their verdict.

But if the application had been made for a new trial, based alone upon the affidavit of any of the jurors, showing a misconduct in the jury no matter how reprehensible and improper, the court should have refused a new trial.

The doctrine is now well settled, that jurors cannot impeach their verdict on their own affidavits or statements. Although the practice once obtained—both in England and in this country—of receiving the affidavits of jurors in proof of their misconduct, in support of a motion for new trial, or in arrest of judgment, yet for many years in England, such affidavits have been entirely rejected, as they are also in most of the states in this Union.

In the case of *Vain* v. *Delaval*, 1 Term, Rep. 11, motion for a rule to set aside a verdict upon an affidavit of two jurors, who swore that the jury being divided in their opinion, tossed up, and that the plaintiff's friends won: Lord Mansfield, Ch. Jus. says: "The court cannnot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor, but in every such case, the court must derive their knowledge from some other source: such as from some person having

seen the transaction through a window, or by some such other means." The same rule was adopted in the case of *Owen* v. *Warburton*, 1 New Rep. 326, in which Sir James Mansfield Ch. Jus. observes: "We have conversed with the other judges upon this subject; and we are all of opinion that the affidavit of jurymen cannot be received." He also adds: "It is singular indeed, that almost the only evidence of which the case admits should be shut out; but considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence."

This we understand to be now the settled doctrine in the courts of England. The affidavits of jurors are excluded because: First, a proper regard to the administration of justice, and the respect and confidence which should be entertained for jury trials, at once forbids a court from receiving their affidavits as evidence of their own corruption, impeaching a verdict made under the solemnities of an oath, and showing an utter disregard for those high moral and legal obligations resting upon them as impartial jurors: Second, because it would at once hold out a strong inducement for disappointed and unsuccessful attorneys and suitors to obtain from jurors affidavits showing either some real or supposed misconduct on the part of some of those who tried the cause, and these affidavits would be presented to the court, as a ground for a new trial, in most of the severely contested cases in this country. While it is highly improper and inexcusable in a jury, after retiring to make up their verdict, to converse with any one except their own number upon the subject of their verdict, or the facts of the case, or to read a paper, deposition or other document, not properly before them, by which their minds might be influenced, or to come to a decision by casting lots or any other hazardous and uncertain expedient; still, if a jury should so far forget, and disregard their solemn obligations and duty, as to permit these influences, and resort to these tricks, the fact

must be established by other proof, to entitle the party to a new trial, than that furnished by the jurors themselves. In the case of *Dana* v. *Tucker*, 4 Johns. 487; the court drew a distinction between the affidavits of jurors in support of their verdict, and impeaching it. The former the court admitted, while they rejected the latter. The court say: "The better opinion is, and such is the rule adopted by the courts, that the affidavits of jurors are not to be received to impeach a verdict, but they may be admitted in exculpation of the jurors, and in support of their verdict." Applying that rule to the present case, the affidavit of Hathaway must be rejected, and the case stands upon Martin's affidavit in support of the motion, who swore that he took the deposition from the jury, which would create the presumption that it was read; and unexplained might be sufficient cause for a new trial. To rebut this presumption, and in support of the verdict, we have the affidavit of four of the jurors, which upon the above authority was proper for the consideration of the court. In any view we have been able to take of this case as presented by the record, the court did not err in overruling the motion for a new trial.

Judgment affirmed.

J. C. Hull, for plaintiff in error.

H. T. Reid, for defendants.

JONES *et. al. v.* PEASLEY.

In attachment proceedings, a delivery bond, executed to the satisfaction of the sheriff, removes the lien from the property attached, and leaves it under the debtor's control, subject to his debts, or to another attachment levy; and the fact of its being subsequently attached will not satisfy the conditions of the delivery bond.

The condition of the delivery bond can only be avoided when the property to be delivered has been lost or destroyed by unavoidable accident or without negligence.

ERROR *to Des Moines District Court.*

Opinion by GREENE, J. This was an action of debt on a bond executed by Edwin Wilcox, as principal, and Joseph Upham and Francis J. C. Peasley as sureties, to release goods taken by attachment in favor of plaintiffs. Service only on Peasley who appeared and interposed several pleas in defence. Issue was joined upon the first and second, and the plaintiffs demurred to the third, fourth and fifth pleas, and filed their replication to the sixth, to which defendant demurred. The court overruled the demurrer to the three pleas, and sustained the defendants demurrer to the replication. The plaintiffs refusing to reply over to the four pleas, judgment was rendered against them on demurrer.

This ruling of the court upon the two demurrers is now assigned for error.

The third and fourth pleas allege in substance, that after the execution of the bond and the delivery of the goods to Wilcox, the same goods were taken from him, and his sureties by virtue of a writ of attachment in favor of Austin and Spicer, and by a like writ in favor of the Merchants Exchange bank of New York, both issued against Wilcox subsequent to the attachment, from which the goods were replevied by virtue of said delivery bond.

The fifth plea avers that one item of the goods—a piano—was taken from their possession by virtue of a writ of replevin issued at the suit of Susan Whittlesey, and that the balance of the goods were lost without their negligence.

We are now to inquire, do the facts alleged in each of the above pleas constitute a good bar to the action? Do they avoid the conditions of the bond?

The attachment law provides, that the property attached shall remain in the hands of the officer who served the writ, to abide the judgment of the court, unless the defendant shall give bond in double the value of the property, with two sufficient sureties, made payable to the plaintiff, "and conditioned that said property or its appraised value, shall be forthcoming to answer the judgment of the court in said suit;" Rev. Stat. 79 § 10. The conditions are unqualified and explicit. They furnish no other alternative than the production of the property or its appraised value to answer the judgment. But the twelfth section of the act provides, that "should the property or any portion thereof be lost or destroyed by unavoidable accident or without negligence, the condition of said bond shall not be deemed to have been broken." No other circumstance or contingency, than such loss or destruction, can be alleged under the statute, to release the obligors from a compliance with the conditions of the bond.

But it is contended that the subsequent attachment, by which the law took unavoidable possession of the property from the obligors, should release them from liability; that though the statute does not so expressly declare, yet such may be inferred as the intention of the law; that the delivery bond was only intended to change the custody of the property from the hands of the sheriff into those of the defendant to abide the "judgment of the court;" and that the levy is not released nor the attachment dissolved by the execution of the delivery bond.

If true that the levy is not released by the execution of

the bond, the other conclusions formed by counsel for defendant might be supported by law, but if such lien is extinguished by the bond, it would defeat the object of the statute and the remedy intended for the vigilant creditor, to decide that the obligors shall be released by the levy of a junior attachment on the same property. To support the position that the lien is not impaired by the delivery bond, the seventh section of the attachment act is cited—Rev. Stat. 79—which declares that the property attached shall be bound from the time of serving the writ. The tenth section provides that the property attached shall remain in the hands of the officer who served the writ, or in his care, unless a delivery bond is given. It is then to be restored to the defendant or to the person who may have replevied the same, upon condition that the property or its appraised value, shall be forthcoming to answer the judgment in the suit. Upon these conditions, then, the property is placed, from the hands or care of the officer, under the absolute control of the defendant, and the bond is substituted for the plaintiff's lien upon the property. The act appears to contemplate that the attachment is relinquished for the bond, and makes the sheriff responsible for its sufficiency. § 13. By requiring ample security on the bond, and by making the sheriff liable for its sufficiency it may well be assumed, that no other means of payment is designed by the law, and that it intended a release of the property from the attachment. The delivery bond fully answers the object of the attachment. And as it insures the payment of the debt, there can be no longer any motive at law, for regarding the attachment as operative. Having answered the purpose for which it was issued, its power ceases by its own limitation. Should the property be forthcoming agreeable to the conditions of the bond, it would not be placed under the attachment nor revive its force, but it might be placed under execution to satisfy the judgment in the suit.

We think it clear then, that the execution of the delivery

bond left the property in possession of the debtor as free and unincumbered as it was before the attachment levy. He had it in his power to sell or otherwise dispose of the property; and if sold, the vendee's title would not be subject to the attachment lien. The fact that he had the right to retain or dispose of the property, that the express condition of the bond could be complied with, without restoring it to the officer, supports the position that the lien was released by the bond. This view is fully authorized in *Brown* v. *Clark*, 4 How. 4, in which it was held that property levied upon by execution is released by a forthcoming bond. This was in affirmance of the doctrine established in Mississippi where the bonds contain the separate condition to have the property levied on, forthcoming on the day of sale; and not in the alternative to bring forth the property, or its appraised value, as provided by our statute. Hence, under our law there is stronger reason for the rule that the bond vacates the lien. But on the other hand, the forthcoming bond of Mississippi upon a breach, or forfeiture becomes a statutory judgment against the defendant and sureties, and operates as a lien upon the real and personal estate of all the obligors; and this difference it is claimed, weakens the authority of *Brown* v. *Clark* in its application to this case. This objection is removed in the *Bank of U. S.* v. *Patton* et. al., 5 How. Miss., 200, in which the court declare what would have been the effect of the forthcoming bond, if the statute had not annexed to it the force of a judgment; and say, "as it releases the levy and restores the property to the debtor, it is tantamount to a satisfaction of the execution, and the creditor would be left to pursue his remedy upon the bond." This view is approved in *Brown* v. *Clark*, and hence that case has full application as authority, to the case at bar.

We conclude then that the attachment levy was released by the delivery bond, that the defendant thereupon regained his former right to the property; that as the plaintiff in the

attachment had taken the bond in substitution of the property, he thereby relinquished all control or claim to it; and that defendant could dispose of it at his election. It follows therefore, that the property was subject to the payment of defendant's debts, and to any attachment levy, and if taken by attachment or other legal process, such taking could not satisfy the conditions of the bond. Those conditions are absolute unless the property or some portion thereof be lost or destroyed by some unavoidable accident or without negligence. No other excuse than such as will come within the letter of this statute can be set up by the obligors; no other could have been contemplated by the law; and this we think was interposed for the benefit of sureties who may have depended upon the property in the hands of the defendant, or in their own charge, to meet the conditions of the bond. In connection with this excusing clause in the act, it is insisted that the relation and legal liabilities of bailor and bailee subsisted between the obligors and obligees in the bond. But the views already expressed, show that no such relation can exist between the parties. The creditors were never entitled to the possession, and after executing the delivery bond, the defendant acquired exclusive right over the property. Hence the argument will not apply, that the obligors, like bailees were not responsible for losses resulting from the strong arm of the law as from irresistible force. If a subsequent levy or attachment should be admitted as a good defence, it might result in great abuse and injustice. Designing men could readily bring about the very state of things, that would free them from their obligation, and at the same time deprive the first attaching creditor of all security. Junior or even fictitious creditors might thus be preferred to those who have acted *bona fide* and with diligence. It may readily be perceived without illustration, how this result could be produced.

But it is argued, that if obligors are held to the strict letter of the statute in their defence, it may result in great

hardship to the sureties. It is always hard for a security to pay the debts of another; it is however, the result of his own undertaking, and we can see no reason why a creditor acting upon the faith of his assumption should be deprived of his dues upon any other ground than that expressed in the act.

The other points raised in this case need not be considered. Sufficient has been said to show error in the court below in overruling the demurrer to the third, fourth and fifth pleas.

Judgment reversed.

Henry W. Starr, for plaintiffs in error.

L. D. Stockton, for defendant.

LEWIS v. KENNEDY.

Evidence that an attachment debtor, while residing in another state, and over ten years before was embarrassed, litigious, and had put his property out of his hands is not admissible or relevant to prove that "he *is* about in some manner to dispose of or remove his property with intent to defraud his creditors."

ERROR *to Des Moines District Court.*

Opinion by WILLIAMS, C. J. This action is brought upon a record of a judgment, certified from the court of common pleas of Trumbull County, Ohio. The plaintiff in the court below declared in debt, and sued out a writ of attachment. Upon appearing in defence of the action, the defendant by plea denied the facts set forth in the plaintiff's affidavit, upon which the writ of attachment was founded. An issue was made thereon and tried by a jury. The finding of the

jury was for the plaintiff. Judgment was entered accordingly. The material allegation in the affidavit upon which the plaintiff sued out the writ of attachment, and denied by the defendant in the issue tried, is as follows: "That said Gary Lewis *is* in some manner about to dispose of, or remove his property with intent to defraud his creditors." The testimony adduced upon the trial is contained in depositions, all of which are here certified and made a part of the bill of exceptions. The matters set forth in the depositions and permitted by the court to go to the jury to maintain the issue, on the part of the plaintiff, were objected to by the counsel for the defendant, on the ground that they do not apply to the issue, are irrelevant, and not responsive. The court overruled the objection and permitted them to be read in evidence. Exceptions were taken to that ruling. It appears by the depositions of witnesses, citizens of Trumbull County, Ohio, that Lewis some ten years ago removed from thence to Iowa. That for some twenty years or more, he had been extensively engaged in business there. That he became involved in debt and embarrassed. Judgments to a large amount were obtained against him, and persons who were his sureties, and executions were issued on those judgments. That previous to the issuance of those executions he had put his property out of his hands by transferring it to others, so that it could not be made subject to levy. That persons who had become his endorsers and security in the indebtedness, were proceeded against, and some of the money made out of them. That notwithstanding the transfer of his property, he continued to exercise control of it. That there was much strife, legally and otherwise, between him and his creditors, and those who had become involved with him as his bail. Such was the condition of his affairs of business until he removed to Lee County, Iowa, where he had been resident some ten years before the commencement of this suit, and the attachment proceeding thereon. The testimony is very voluminous and consists of facts testi-

fied, chiefly, by persons who had been engaged in legal strife with him there. The evidence of the several witnesses concurs in charging him with a litigious spirit, and establishes the fact that, when executions were likely to be issued against him in Ohio, he was in the habit of transferring his property to avoid the effect thereof. There is no evidence whatever, tending to establish any fact which would even raise a presumption that, since his residence in Iowa, for ten years previous to the sueing out of the attachment, he had manifested any design to avoid in any manner the payment of his debts. Such is the sum of the evidence, so far as is material for consideration here.

Did the district court err, in admitting this evidence, and by instructing the jury as to the law upon it, as set forth in the record? The evidence having been allowed to go to the jury, the court was requested to charge the jury as follows: That the plaintiff cannot sustain this issue by proving that the debtor was a man who was pre-disposed to convey his property to hinder and delay his creditors." This instruction was modified by the court, by adding thereto, the following: "Such testimony, alone, may not be sufficient, but such a fact may be given to the jury." It was thus given to the jury.

The court was then further requested by defendant's attorney, to instruct the jury as follows: "That the plaintiff must show, affirmatively, that he had, from the facts which were transpiring at or about the time of the attachment, *good grounds* for believing that defendant was about to convey his property fraudulently to keep it from his creditors." This was also given by the court with the following modifications: "The general conduct of the defendant upon that subject for a long continued time prior to the attachment, may be considered by the jury." It is the opinion of this court, that the evidence as permitted to go to the jury was of itself improper, not being pertinent to the issue, and that the instructions of the court

thereon were erroneous, having a tendency to mislead the jury.

The legislature clearly intended the facts—upon which the belief of the affiant, "that the defendant *is about in some manner* to dispose of, or remove his property with intent to defraud his creditors"—should be founded and predicated upon some indications of word or act, which would warrant a reasonable man to believe that he, *then*, at the time of the application for the writ, was *about* to defraud his creditors. These facts are by the terms of the act made essential to the right of the attachment. A mere speculative or vague belief, is not contemplated. Such a belief is not susceptible of establishment by proof. It must necessarily depend upon the opinions of those who might be influenced by caprice or prejudice for or against a defendant. The trials of an issue, made upon such belief, could never be adjusted, so as to be reasonably certain, and free from doubt. Surely the legislature never intended to authorize a resort to such extremely harsh procedure on such grounds. To do so would render the most honest debtor liable to disappointment and the ruin of his property and credit, at the will of an impatient or incensed creditor. The legislature, by the terms used in the act, intended that the fraudulent design of the debtor should be established by the proof of facts relative to the subject matter of the issue on trial, in accordance with the well defined rules of the law of evidence. This we hold to be the manifest design of the statute, as well as the dictate of sound reason. Any other construction would lead to injustice and oppression. The statute authorizing the issue and trial upon it, we think, is sufficiently explicit upon this subject. It is as follows: "When a writ of attachment shall be sued out from any court of record of this state or from any justice of the peace, upon the return thereof, the defendant may join issue on the facts and allegations set forth in the affidavit, on which the attachment is sued out, and thereupon said issue shall be

tried by a jury impanneled and sworn to try the same in like manner as a jury is impanneled and sworn to try other issue of fact in said courts." Rev. Stat. 78, § 2.

But it is urged "that the evidence adduced on the trial of the issue, which strongly tended to establish the design of defendant to hinder, delay, and defraud his creditors in Ohio, before he removed to this state, and which related to transactions there, which transpired some ten years before the sueing out of this writ, was properly admitted by the court on the trial below, and that it was sufficient to warrant the finding of the verdict of the jury, on the ground that it went to show his fraudulent disposition, and establish his general character, as a man who would delay and hinder his creditors in their legal attempts to enforce the payment of his debts." What we have already said upon the subject of the design of the statute as expressed therein, as to the issue, and the facts intended to be tried thereon, is sufficient to make manifest the inapplicability of this evidence to the issue as joined, and the error of the instructions as given by the court to the jury in the case at bar. The bill of exceptions purports to set forth all the testimony of the case. It consists entirely of facts which had transpired in the state of Ohio, ten years anterior to the issuance of the attachment in this case, without any direct application to the issue contemplated by the statute, and as joined between the parties. It could only serve to raise a presumption against the defendant, based upon those facts, from which his general character might be assailed. But would this evidence be sufficient to justify the jury, upon the issue joined, to find a verdict that, *at the time* of the sueing out of the writ of attachment in this suit, he was about to dispose of his property with intent to defraud his creditors? We think not. However competent such evidence might be, if the plaintiff had first given testimony of any fact or facts, which would tend directly to establish, on his part, the issue joined, in order to strengthen the evidence,

certainly—until some ground in fact, upon the issue then joined had been laid for its operation—it was inadmissible, being irrelevant. The general character of a party, can, in any case, be known, and formed by his conduct in matters occurring in his life, previous to the occurrence of the facts alleged in the action, and the issue on trial. To allow such facts to be resuscitated after the lapse of ten or twelve years, and made the gravamen of a legal proceeding such as this, would be pushing the severity of the attachment law to an extreme never contemplated by the legislature. Such a a construction of the law would operate oppressively, by stamping upon a man a character for fraudulent design in his transactions of life, which would preclude him from reclaiming his position in reputation or business. "The general character of the parties to a civil suit offers such a weak and vague inference, as to the truth of the points in issue between them, that it is not usual to admit evidence of it." In an action by an heir at law, for fraud and imposition by defendant, and also, in an action for keeping false weights, it was ruled that witnesses could not be examined to give evidence of general character; 1 Phil. Ev. 466-467, and cases there cited. If such evidence when offered as additional to those directly touching the issue, and cumulative be inadmissible, how much the more so, when an attempt is made to use it to prove the issue as joined in the case at bar.

We are of the opinion that the evidence as given to the jury was of facts upon which the issue in the case did not depend, and therefore it was irrelevant. The instruction of the court is also erroneous, being upon irrelevant testimony as the case was presented, and calculated to influence and mislead the jury; *Weed* v. *Bishop*, 7 Conn. 128; *Shearer* v. *Clay*, 1 Litt. 260; *Osgood* v. *Manhattan*, Co., 3 Cowan, 621; *Penfield* v. *Carpenter*, 13 John, 350; *Irwin* v. *Cook*, 15 John, 239. Judgment reversed.

J. C. Hall and *C. H. Phelps*, for plaintiff in error.

L. R. Reeves, for defendant in error.

Wright v. Stevens.

Notice for a change of venue was given on the second day of the second term after suit, without stating in the notice or petition any reason for the delay; held that this did not amount to reasonable notice as required by statute.

In an action of right against an occupying claimant, he will not be liable for any damages, if it appear at the trial that the defendant had made, or even purchased valuable improvements on the land.

Error *to Lee District Court.*

Opinion by Kinney, J. Action of right brought by Stevens against Wright. Judgment in the court below for Stevens. Wright sued out a writ of error and the ruling of the court is assigned for error. It appears from the record that the defendant Wright applied for a change of venue which application the court refused. This was excepted to and is relied upon as a reason why the judgment should be reversed. We think the court were right in overruling the motion. Rev. Stat. 639, § 2, provides that any party to a suit may present to the court, or judge thereof in vacation, a petiton, to which an affidavit shall be appended setting forth the cause for his application for a change of venue. § 3, provides that if reasonable notice shall have been given to the adverse party or his attorney of the time and place of such intended application for a change of venue, the court or judge thereof in vacation shall hear the case and if the application be in accordance with the provisions of the act, a change of venue shall be awarded, &c.

The question presented here is, did the adverse party in the case have such reasonable notice of the application as he was entitled to under the statute.

The case was commenced in March, 1849, and had been continued one term of the court, when the application was made. At the November term, the defendant served a

notice, that he would apply for a change of venue. This notice was served on the 2d day of the term, that his application would be made on the day following. Service was acknowledged at two o'clock P. M., of the day of service. The defendant filed his petition for a change of venue on the 8th day of the term. On the 9th day defendants counsel called up his application. The counsel for plaintiff objected on the ground that he had not had the requisite notice. The following day the cause was called for trial, and defendant's counsel asked for a change of venue which the court overruled, and the cause was ordered for trial. The party in this case did not bring his application at all within the provisions of the statute. If the facts upon which his application was based existed at the first term, and were known to him, his application should have been made at that term. If they had come to his knowledge since the first term, or did not exist at that time, that should have been stated as an excuse for not having previously made the application. It is clearly the intention of the statute, that these applications shall be made as soon as the petition and affidavit can be filed; hence it may be made in vacation. The object of this undoubtedly is to save and prevent the trouble and expense of a preparation for trial. It would be manifestly unjust to permit the case to slumber a term in court, and for the party intending to take the change, to withhold his motion until the adverse party has come prepared for trial—his witnesses in court, with the fullest confidence and expectation that the case would be tried in its regular order, and then about the time it was called for trial for the case to be transferred by change of venue; when the party could just as well have made the application before this preparation and expense had been incurred. The reasonable notice required by the statute was intended to prevent this surprise, and save this inconvenience and expense. We will not pretend to lay down any general rule defining what shall constitute reasonable notice. This must depend upon the

circumstances of each particular case, and then be left to a great extent to the sound legal discretion of the judge. But we will not hesitate to say that in this case the notice was unreasonable and insufficient.

We will now proceed to the next and only remaining question. In relation to occupying claimants in an action of right, the statute provides, "that no defendant in the above named actions shall be liable for any damages to the plaintiff, nor in any action for mesne profits or damages for use and occupation, if it shall appear at the trial of said cause that said defendant or defendants has or have made valuable improvements on said tract or tracts of land the possession of which is sought to be recovered by the plaintiff or the plaintiffs."

A majority of the court are of the opinion that all valuable improvements whether made by the defendants or purchased by him may be set off, against the use and occupation in an action of right. We have before decided that a judgment cannot be obtained in this action against the plaintiff for the value of the improvements if they exceed the rents and profits. But to place a construction upon the statute by which the defendant would be restricted to the improvement actually made by him, would in our opinion defeat the object of the legislature, in extending this relief to occupying claimants. This is an equitable statute. It is entitled to such a construction as will make it effective and subservient to the object of its equitable provisions. Its object is to prevent a recovery for damages for use and occupation against the occupant, when valuable improvements have been made on the land. These improvements the owner obtains and the legislature here said that they shall be in lieu of his damages for use and occupation. They belong to the soil. They enhance its value, and they are the property of him who has the title. As far then as he is concerned, it matters not whether they were placed there by the man in possession or some prior tenant. They

are his and the legislature have virtually declared that they shall be in full satisfaction of damages for use and occupation. They have done this upon the ground no doubt that by the improvements the land is rendered more desirable and valuable. The prior tenant has no claim upon the owner for any improvements he has put upon the soil; that is if he has made them without an express or implied contract to pay for them. If he were sued for rents and profits, he could not set off the improvements, for he is not in possession. They can only bar the recovery for damages by being pleaded by the man in possession. By giving the statute the literal and illiberal construction contended for by counsel for the defendant in error, the case would stand thus: A. sues B. in an action of right. B. has purchased the possession and the improvements of C., for which he has paid one thousand dollars. The improvements are valuable and permanent. B. has been in possession one year; worth to him one hundred dollars. C. has no claim upon A. for these improvements and in a suit for that purpose could not recover a dollar; neither could he set them up in a suit against him, if A. should sue him for damages for use and occupation. Yet B. is not permitted to set off these improvements which have cost him one thousand dollars and which are actually worth that to the owner of the land against the use and occupation for one year. We cannot give to a statute intended to be equitable, so perverted and manifestly unjust a construction. If the improvements are valuable the defendant is not liable for damages for use and occupation, no matter by whom made. In this case it does not appear whether the improvements were or were not valuable; the record is silent upon that point. This point however is not raised in the argument, as we presume counsel desired a construction of this statute and consequently did not rely upon this position. We have therefore met the question as it was argued upon its merits. We will only add, that improvements in order

to exempt the defendant from damages must be of a valuable character. The court therefore erred in refusing to instruct the jury that the defendant might set off the improvements whether made or purchased by him.

Judgment reversed.

Geo. C. Dixon and *J. C. Hall*, for plaintiff in error.

L. R. Reeves, for defendant.

Ennis v. The State.

Where a person in the employment of another, was entrusted with a span of horses and wagon, and while thus in charge appropriates them to his own use, the crime is embezzlement, and not larceny under the statutes of Iowa.

To constitute the offence of larceny it should appear that the goods were procured *animo furandi*, or there should have been evidence tending to show that the property was delivered to the prisoner under the influence of false, fraudulent or improper efforts.

Error *to Lee District Court.*

Opinion by Greene, J. Indictment for larceny against William Ennis for stealing two horses, a wagon, set of harness, and a cloak from Alfred Pope. Prisoner found guilty and sentenced to three years imprisonment.

To the proceedings below three errors are assigned: The first two are so obviously groundless that they need not be noticed. The third error alleged is, that the court refused to set aside the verdict and grant a new trial. The motion made for that purpose avers that the verdict is contrary to law, and to the evidence in the case, and to the instructions

of the court. The bill of exceptions purports to give the substance of all the evidence submitted to the jury. By this testimony the following facts are proved: About the first of April, 1850, Pope requested and hired the defendant to drive his wagon and horses from Keokuk to Montera; the defendant undertook to drive the wagon and horses and return with them to Keokuk on the same day, agreeable to the contract, but did not return. Three days after Pope went in pursuit of defendant, and found the wagon and harness under a shed at St. Francisville, Mo., and the horses in St. Louis, where the defendant was also found, on a boat bound for Cincinnati. A Mr. Martin testified that about the last of March or the first of April, 1850, he went with one Hollingsworth, who wanted to buy horses, to a man who he thinks is Alfred Pope, that he is not acquainted with Mr. Pope, that Hollingsworth told him he was going away but would be back in a few days, when he would see him again about buying the horses; that the man who he thinks is Alfred Pope told him that he also should be away from home, but that if he came he could get the horses from the defendant, Wm. Ennis, as he had authorized said Ennis to sell them, and he knew the price. Pope testified that he did not recollect the conversation sworn to by Martin. The following agreement, as to testimony, was admitted in evidence: "It is admitted that if Elizabeth Bently was here she would testify that the cloak which the said defendant is charged with stealing, was put upon the shoulders of the defendant by Pope, the owner, at the time he is charged with having stolen it. It is also admitted that John Rayney would testify, if here, that Pope, Ennis, and himself and others were present at the time Ennis got in the wagon with the cloak over his shoulders in full view of Pope and several others; therefore it is agreed that the above statement shall be received as the testimony of said witnesses on the trial of this cause."

This is the substance of the testimony on which the

defendant was found guilty of larceny. There is no other evidence of record tending even remotely to prove any other fact or circumstance against him. Under the statute of this state, regulating crimes and punishments, we think the testimony wholly insufficient to justify a conviction for larceny, although it would fully authorize a conviction for embezzlement. A marked distinction is made between the two offences; while the one is arranged under the first, the other comes under the second class of offences. To establish the crime of larceny a "felonious stealing, taking and carrying, leading, riding or driving away the personal goods and chattles of another" must be proved. It is not always necessary to prove that the goods were taken from the actual possession of the owner without his consent. Larceny may be committed of goods obtained from him by delivery where they were procured *animo furandi*. But when goods and other valuable effects are entrusted by the owner to a clerk or servant and he converts to his use without the consent of his master, any of those articles which came into his possession by virtue of his employment, or any person to whom such goods or any valuable personal property may be delivered to be transported or carried for him, shall take and convert the same to his own use without the assent of the employer, such convertion, according to the statute, is not larceny but embezzlement, and such is shown by the evidence to be the character of the proceedings at bar. That the property was voluntarily delivered to prisoner while under the employment of the owner is not disputed, and that he appropriated the property to his own use while thus employed is equally well established by the testimony. To preserve the distinction made by the legislature between larceny and embezzlement, testimony which proves the latter offence and nothing more, should be adjudged insufficient by our courts to establish the crime of larceny; and hence we think the court below should have

granted the motion to set aside the verdict and for a new trial.

The court appears to have charged the jury correctly as to the distinction between the two offences, to have given them the statutary definition of embezzlement, and to have told them that if the facts proved showed only a commission of that offence they should not find him guilty of larceny as charged in the indictment. It is justly claimed, then, that the verdict was against law, against the evidence, and against the instructions of the court. If the evidence had even a remote tendency to show that the prisoner obtained the property by the consent and the delivery of the owner under false, fraudulent or improper efforts, or that he had otherwise obtained the property without having been employed by the owner to take charge of it, the verdict could not be disturbed. But the offence proved is so distinctly characterized from the offence charged that we think the judgment should be arrested and the prisoner discharged.

Judgment reversed.

T. W. Clagett, for the prisoner.

C. J. McFarland, for the State.

TEVIS *et. al. v.* FOSTER.

Judgment should not be rendered against a garnishee when his answer shows that the goods and credits of the debtor came into his hands in his capacity of clerk or agent for a third party, and that he had delivered them to his employers who were creditors of said debtor.

ERROR *to Des Moines District Court.*

Opinion by WILLIAMS, C. J. Tevis, Scott and Tevis sued John Fullerton by attachment. Foster was garnisheed, in accordance with the statute. Foster appeared at the time required, and having answered the questions which were propounded to him was discharged, with his costs. Judgment was accordingly entered.

The only error complained of by plaintiffs is that the judgment of the district court should have been against the garnishee.

The record shows the following state of facts as contained in the answer of Foster. To the question whether "at the time after service of the summons of garnishee at the suit of *Tevis, Scott* and *Tevis* v. *John Fullerton*, he had in his possession or control any goods, moneys or effects of said Fullerton. If so, what property, how much, and of what value, and what money or effects?" He answered "that sometime in the month of September, 1849, John Fullerton arrived at St. Louis and deposited through his brother, Robert Fullerton, resident in St. Louis, a letter to the address of R. & W. Campbell, of that city. This letter contained an assignment by said John Fullerton of all his stock, notes, &c., &c., to R. & W. Campbell and Eugene Kelley & Co. The assignments were not accepted. On my arrival at Burlington, Nexon, a brother of John Fullerton, transferred the books of John Fullerton to R. & W. Campbell and Eugene Kelley & Co., to secure their claims against him. The accounts on the books were subsequently made out by

me and Mr. Donahue, aided by Nexon Fullerton, and as many of them closed by cash or note as possible. Prior to the transfer of the books by Nexon Fullerton, having declined acceptance of the assignment, I attached the goods of said Fullerton to secure, in part, the claim of R. & W. Campbell. The amount of money which I received on Fullerton's debts I do not now know; the amounts received by Mr. Donahue and myself were $162,75. The books of John Fullerton at the time of the service of the garnishee summons were in possession of Mr. Donahue and myself; or rather we exercised supervision over them. When I left Burlington on my return to St. Louis the books remained in the possession of Mr. Donahue, who, on his arrival in St. Louis handed them over to Nexon Fullerton, who, in turn transferred them to me. I had them taken to the counting room of R. & W. Campbell, where they were when last I saw them." Foster on his examination, further stated "that on the settlement of the accounts in the books of Fullerton, when they were not paid, notes were taken and the accounts closed. When he left for St. Louis, the notes were left with Mr. Donahue; they amounted to between five and six hundred dollars, and were taken for the benefit and to the order of Robert Campbell and Eugene Kelley, respectively. The money collected, $162,75, is now in the temporary possession of R. & W. Campbell, of St. Louis. In this matter the garnishee was acting as the agent of R. & W. Campbell, as was Mr. Donahue of E. Kelly & Co. That the books would cost when new about ten dollars; that John Fullerton's arrival in St. Louis was previous to the coming of the garnishee to Burlington, also previous to the garnishee summons in this case; that the remaining accounts drawn from the books of John Fullerton were left by Mr. Donahue with Justice Stull for collection, and that they were to be collected for the benefit of Robert Campbell and Eugene Kelley."

John Fullerton being a merchant and in failing circum-

stances, had a right to prefer one or more of his creditors provided this was bona fide. There is nothing disclosed by the examination of the garnishee which would impeach the transaction for fraud. R. & W. Campbell and Eugene Kelly had, as creditors of Fullerton, legal possession of the goods and effects of Fullerton by virtue of the transfer made by him through his agent, Nexon Fullerton, and by the writ of attachment issued by Foster prior to the issuance of the writ and summons of garnishment in the case of Tevis, Scott and Tevis. It does appear that the goods and effects which were transferred and attached for the benefit of Campbell, and Kelly & Co., were not then sufficient to satisfy their claims against Fullerton. The statement of the garnishee, that he acted as the agent of R. & W. Campbell when he had the goods and effects in his hands and that he as such delivered them to his employers at St. Louis, would not justify a judgment against him.

Judgment affirmed.

L. D. Stockton, for plaintiff in error.

D. Rorer and *M. D. Browning*, for defendant.

PETERS *v.* THE STATE.

To an indictment for selling liquor without a license, the defendant pleaded that he had a license, and issue was joined upon that plea, and upon that issue the jury found the defendant guilty; held that the plea should have been "not guilty;" that the state should not have joined issue upon any other plea, and that the verdict and judgment rendered under such an issue should have been arrested.

ERROR *to Lee District Court.*

Opinion by KINNEY, J. The plaintiff in error was indicted for selling liquor without license. By the plea which he interposed he acknowledged that he sold the liquor, but averred that he sold the same by virtue of a license issued for that purpose, which he sets out and makes part of his plea. The state replies to the plea, and takes issue upon so much of the plea as relates to the defendant's having a license to sell, &c.

The cause was tried upon this issue and upon the evidence the jury found the defendant guilty. A motion was made in arrest of judgment on the ground that the issue was immaterial, and consequently no judgment could be entered upon the verdict, which the court overruled. This is assigned for error.

We think the court should have arrested the judgment. The plea tendered an immaterial issue. The state accepted the issue so tendered, and upon this issue the court permitted the parties to go to trial. The plea should have been "not guilty;" and the license used as evidence to establish the truth of the plea. But, instead of this, the plea was that he had a license, by which he was authorized to sell; and the state saw proper to join issue upon this question of fact, which only left the simple question for the jury to find whether he had a license as averred in his plea or not. If the jury found that he had a license, they must so report as their verdict, and if they found on this issue, that the

defendant had not a license, they must then report that fact as the result of their verdict; but upon neither verdict would it be possible to enter up a judgment. The whole object of jury trials in criminal cases is to ascertain whether the accused is "guilty" or "not guilty," and not to try an issue upon an immaterial fact, because unless the merits of the case can be tried on the issue, nothing is accomplished, nothing established. The plea presented a very essential item of evidence for the defendant, and it might or might not constitute an insuperable defence, but this could only be ascertained when it was introduced as proof under the proper plea, but not as offending matter of itself upon which to base an issue. The jury could not properly find the defendant "guilty" upon the issue joined, because they were only sworn to try the issue between the parties, and that issue as we have shown was whether Peters had a license to sell or not, and a verdict of "guilty" or "not guilty" would not be at all responsive to the issue which was made by the parties, and which the jury were sworn to try and determine. Then the only verdict that the jury could return was whether the fact averred in the plea was true or false, and such a verdict, as we have said, would virtually amount to nothing, as no judgment could be rendered upon it.

The court then we think should have arrested the judgment, and as they did not it was error.

Judgment reversed.

C. H. Phelps, for the prisoner.

C. J. McFarland, for the state.

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Huner *v.* Doolittle.

An attorney confessed a decree of foreclosure by virtue of a power of attorney, but the decree was erroneous in computation and reversed; held that the attorney could again confess a decree under the same power.

In computing interest, where the payment exceeds the amount of interest due, calculate interest on principal up to date of payment, add interest to the principal and deduct payment.

When the payment falls short of the interest due, calculate interest up to a time when the payment will overrun the interest due on the principal and then deduct the payment, and on the balance commence again to compute the interest.

Error *to Lee District Court.*

Opinion by Greene, J. In this case a decree of foreclosure was confessed in the court below, on a power of attorney.

A decree had been confessed in the same case at a previous term of the court. It is therefore contended that the first act of confession exhausted the authority of the attorney to confess under that power. This would be true if the first decree had been valid or remained unreversed. But it appears that it was taken to the supreme court and reversed. This placed the case and the rights of the parties the same as if the first decree had not been rendered. The intention of the power had not been carried out, consequently the object was not accomplished, and the authority was not exhausted by the first act.

The second objection urged to the decree below, is in relation to the computation of interest. The payments endorsed on the mortgage were applied to satisfy the interest due, and not to the principal. It is contended that the payments should have been applied to the principal exclusively.

In this state no particular rule has been adopted for calculating interest, where partial payments have been

made. But the rule established by the supreme court of New York, in 1824, has been generally sanctioned in other states, and was followed in calculating interest in the present case. As the rule is fair and simple, we think it should prevail in our state. We have therefore concluded to adopt this practice.

When the payment exceeds the interest due, calculate interest on principle, up to the date of payment, add this interest to the principle and then deduct the payment.

If the payment falls short of the interest due, calculate the interest on the principal up to the time when the payments will overrun the interest due on the principal debt, and then deduct payment; so as to avoid taking interest upon interest; *Williams* v. *Houghtaling*, 3 Cowen, 86.

Judgment affirmed.

J. C. Hall and *D. Rorer*, for appellant.

H. W. Starr, for appellee.

Eads *v.* Pitkin.

The proceeding by attachment is alone authorized by statutory provisions, and can only be maintained by a substantial compliance with the requirements of the statute; hence an attachment proceeding is not valid unless the requisite affidavit and bond are filed.

An act "to prevent and punish the owners and masters of steamboats," &c. Laws of 1845, p. 43, does not *per se* authorize attachment proceedings. If an attachment is issued as proposed by the sixth section of that act, it must still conform to the general attachment law.

Without a statute expressly authorizing it, a party cannot sue in debt for a tort.

ERROR *to Lee District Court.*

Opinion by WILLIAMS, C. J. This action was commenced in the district court at Keokuk, Lee County, by Pitkin the plaintiff, against Eads the defendant to recover damages for the loss of the barge Pike. In his declaration the plaintiff below designates himself as the owner of the steam boat Confidence, and as such, complains of William Eads master of the steam boat Eliza Stewart, of a plea that he rendered unto him the sum of one thousand dollars lawful money, &c., which he owes, and unjustly detains from him. The declaration charges, that on the tenth day of March, 1848, he Pitkin was the owner of a certain barge named Pike, then situate, lying and made securely fast at the wharf at Keokuk, at the county and state aforesaid, and being such owner, the said William Eads, master as aforesaid—while navigating the waters of this state with said Eliza Stewart,—obtained and used said barge without the consent of the said Stephen H. Pitkin, for the purpose of conveying freight from the shore at Keokuk, in the county and state aforesaid, on board the said Eliza Stewart. That after using said barge as aforesaid, the said Eads left it, in a place different from that from which he had taken it, to-wit: outside the wharf boat, Links, then lying at the wharf at Keokuk, exposed in such careless and negligent manner that said barge was carried away by the current of the Mississippi river, and ice, and sunk in said river. By means of such carelessnnes and negligence, the barge was wholly lost, and the said Pitkin deprived of the rise of the same in running the said steam boat Confidence, one important trip from Keokuk to Galena, Illinois, and back to St. Louis. The declaration then concludes in debt in the usual form, and damages are laid at the sum of one thousand dollars.

The affidavit of Julian H. Lusk who at the time of the alleged taking and loss of the barge, was master of the boat Confidence, is filed with the plaintiff's declaration, in which it is set forth that the barge was used in running the Confidence on the Mississippi river; and that the facts stated in the declaration are true.

A writ summoning Wiliam Eads master of the steam boat Eliza Stewart, to answer, &c., and also a writ of attachment was issued to attach the boat with all her tackle, &c. The sheriff made return of the writs as follows: Served the within writ May 37, 1848, by attaching the steam boat Eliza Stewart, her tackle, apparel and furniture, appraised at ten thousand dollars, also by reading to William Eads master of said boat.

At September term, 1848, a motion was made to dissolve the attachment for the following reasons.

1. Plaintiff's remedy, if he has any, is by proceeding at common law, and not by virtue of any statute of this state.

2. The plaintiff has not set forth a complaint which authorizes an attachment by writ without a bond with sufficient sureties, &c., and no such bond has been filed in the case.

3. The affidavit required by the statute, before a writ of attachment could legally issue has not been filed.

This motion was overruled by the court. A demurrer to the plaintiff's declaration was also filed, for which the following reasons were assigned:

1. The complaint set forth in the plaintiff's declaration, is not such as that therein the action of the debt will lie, as it does not allege the making of any contract or agreement between the parties, and no consideration is therein stated upon which a contract or agreement can or will be implied.

The demurrer was overruled. Exceptions were taken to the action of the court, overruling the motion to dissolve the attachment and demurrer, and filed on the 26th of

September, the defendant filed his plea of the general issue.

At January term, 1849, the plaintiff, on leave given, filed an amendment to the original declaration by adding two counts, charging that at the time of the taking and using the barge Pike, one William Hight was acting master of the steam boat Eliza Stewart, William Eads being the owner and master, and that the boat was then navigating the waters of this state, &c.

The defendant demurred to the plaintiff's declaration, as amended for the same causes which were assigned with the demurrer to the original one. This demurrer was also overruled, and exception taken and filed.

The general issue was entered to the amended declaration. Upon trial a verdict was rendered for the plaintiff for three hundred dollars and costs, for which judgment was rendered.

We will first consider the question presented on the proceeding by attachment in the case. The proceeding by attachment is only by virtue of the statutory provision of this state, and can only be maintained by a substantial compliance with the requirement of the statute. Under the general attachment law the action must be founded on a *contract*, and before the issuance of the writ, the plaintiff must file an affidavit containing the following requisites:

1. A statement that something is *due* from the defendant to the plaintiff, and nearly as practicable the exact amount.

2. That as deponent verily believes the said debtor is a non-resident of the territory—state,—or that he is in some manner about to dispose of, or remove his property, with intent to defraud his creditors, or that he has absconded so that the ordering process cannot be severed upon him, and that the facts and circumstances, on which belief is founded shall be distinctly stated, and set forth in the affidavit. Rev. Stat. Iowa, p. 78, § 1. A subsequent statute passed

and was approved January 17, 1846, amendatory of the foregoing as to the requisites, but does not dispense with them. As there is an entire failure on the part of the plaintiff to comply with the requirements of the statute in filing the affidavit and bond required by the general attachment law, it is clear that under this law, the proceeding cannot be sustained. It is contended, however, that this proceeding is maintainable under the act of June 10, 1845, "to prevent and punish the owners and masters of steam boats committing trespass upon the property of persons living in this state and for other purposes;" Iowa Stat. 1845, p. 43. This is an extraordinary statute, special in its design and penal in character. The three first sections, have no application to a case like this. The fourth section provides, "that if the master or owner of any steam boat as aforesaid, shall at any time hereafter take or cause to be taken any flat, keel boat, or other water craft, from any person in this territory or state, for the purpose of aiding or assisting them in lighting said boat, or in any way conveying freight from or to said boat, or lighting the freight of said boat over either the upper or lower rapids of the Mississippi river, or any bar or shoal or other place on said river, or any river of this territory or state, without the consent of the owner or owners, or in his or their absence and shall refuse to pay a reasonable compensation for the use of said flat, keel boat, or other craft, he or they shall forfeit and pay to the owner or owners thereof, double the amount of what may be considered by the court or jury a proper compensation for the use of such craft, to be recovered by action of debt before any court having competent jurisdiction thereof." This section cannot be held as authorizing the action in the case at bar. It merely makes provision for the recovery of double the amount in compensation of what should be assessed by a court or jury for the use of any boat or water craft taken and used without the consent or in the absence of the owner in case of demand and refusal to pay therefor, and provides

that an action of debt may be maintained to recover that as a penalty for such refusal to pay.

This section treats of a specific matter; the taking and using of a keel boat or other water craft, without the consent of the owner, the refusal to pay for its use, then the penalty thereby incurred, and the mode of enforcing that penalty by action of debt.

The fifth section provides for another state of the case in terms sufficiently distinct for application, so as to prevent confusion. It is as follows: "If any master or owner of any steam boat as aforesaid shall obtain any water craft, as aforesaid, either with or without the consent of the owner or owners thereof, and shall lose, injure or destroy the same, or lose or misplace any apparatus belonging to the same, he or they shall be liable for all such damages to the owner or owners thereof."

A liability such as existed at common law is here asserted for the loss of the boat, or injury to it or the appartus without affixing a penalty therefor, or prescribing the form of action by which the redress should be enforced.

The sixth section prescribes the mode of procedure. It is as follows: "All actions brought under the provisions of this act shall be by warrant or attachment, and the master or owner of said boat shall be held to bail in such sum as the court before which the suit is instituted shall require, until all damages shall be paid, together with costs of suit; *Provided*, all such steam boats as aforesaid, shall be held liable and responsible for all debts and damages arising under the provisions of this act, for a period of time not exceeding two years, and the same shall be a lien on said boat for that length of time, whether said boat shall be sold and transferred, or remain in the possession of the original owner or owners."

We are constrained to confess that this section is somewhat singular in its provisions, viewed in the light of experience in the rules of practice of legal procedure. However

it is our duty if it can reasonably be done to enforce its provisions when a case is properly presented. It was doubtless the intention of the legislature to provide a remedy that would be available in remuneration to the owners of keel boats and other water crafts liable to be used by steam boats on our navigable rivers, and to obtain this end deemed it indispensable to enact a law penal in its character, and special in its provisions. They therefore in prescribing the form in which the action should be brought in all cases arising and coming under this law, direct that it shall be by warrant or attachment. Thus the complainant is limited in his election to one or the other of these processes. In the case at bar the party chose to issue the writ of attachment in order to seize the boat, tackle, &c. Having resorted to this mode of procedure it was incumbent on him to comply with the provisions of the attachment law of the state by filing the affidavit therein prescribed, and giving the bond required by that law, before the issuing of the writ. By simply providing that the complainant might proceed in his action by attachment, without prescribing any special mode of procedure different from that which is set forth in the general attachment law of the state, it must be presumed that it was the intention of the legislature, that the requirements of that law should be observed, and strictly pursued. The proceeding by attachment being extraordinary in its nature, and designed for application to secure the ends of justice in cases specified, and when the ordinary process of law would be unavailing, it is not presumable that the legislature would have authorized a plaintiff to resort to it without protecting the interests of the defendant by the usual and necessary guards. To adopt such a presumption would be in contravention of the most manifest principles of reason and right. It would expose a party defendant to a ruinous sacrifice of his property and effects, at the mere will of an attaching complainant. Such a presumption of legislative design would be violent indeed. We therefore to give the

act of the 10th of June, 1845 effect, in enforcing the remedy by attachment as provided therein, construe it as referring to the general attachment law. Such being our conclusion, it follows of course that the complainant should have complied with its requirements by filing the affidavit and bond prescribed in that act before issuing the writ. Rev. Stat. 78, § 1–5. Having failed to do this, the writ of attachment was issued illegally and should have been dissolved on the motion made by the court below.

Having disposed of the question of the writ, the only point which we deem it necessary to consider and decide, is that touching the form of action adopted by the plaintiff, and set forth in his declaration. The action is in debt. It is urged by the defendant's attorney, that this action will not lie for a tort, and that the complaint is manifestly *ex-delicto*. It is sufficiently clear that the matter of complaint does not present a case arising *ex-contractu*, but that it is an injury consequential upon the unauthorized use of a boat or barge claimed by plaintiff as owner, and the loss of it by negligence. That the plaintiff might have resorted to his action at common law for redress is not questionable. Moreover, that the action of debt would not be maintainable for a mere tort is equally clear, independent of statutory provision. The question here is, whether the action of debt is maintainable for the injury complained of under the provisions of the act of June 10, 1845.

Upon examining the act, by virtue of which the plaintiff's attorney contends that this action is brought, it will be seen that the fourth section is specific in its provision. It inflicts a penalty of double the sum assessed by a court or jury against the defendant, for taking and using any other craft without the consent of the owner, upon a demand and refusal to pay a reasonable compensation for such use, to be recovered by action of debt. The 5th § follows with a provision for another state of the case, that is, "the taking of such water craft, with or without the consent of the owner

and the losing, injuring, or destroying the same, or the apparatus thereof, and renders the person so doing, liable for all such damages to the owner, without specially providing the form of action in which he shall be liable." Now, an action at common law, would undoubtedly lie for an injury, such as is treated for in this section independent of the statute. For this court will not by implication extend an act of this kind beyond its special and plain import. This court is bound by the rule of construction to consider the whole enactment, so as to make it operate consistently in execution of its design, giving effect to its several provisions. The 5th § is simply declaratory of a common law right to an action for the wrong therein set forth, but does not prescribe the form of action, as is done in the 4th § where the penalty is prescribed.

The plaintiff has not sued for the penalty under the fourth, but has brought his action on the 5th §, to recover damages for the loss of his boat by the negligence of the defendant. This he might assuredly do. But as the statute is silent as to the form of the action, we think he should have conformed to the practice at common law. In this view of the case, he has certainly mistaken his action. 1 Chitty's Pl. p. 98–99, and note; 100 and note 1, 115; 1 Chitty's Pl., 101–107 and note 4; Idem. 197. Without a statute enabling him to do so by express terms, he could not sue in debt or a declaration for a tort. If such procedure were allowed by courts, where special and extraordinary, such as the one under consideration are passed, the rights of parties defendants in action would be curtailed in pleading, and they rendered liable thereby to inconvenience and wrong. Courts will not aid by extending or enlarging statutes of this kind. They are generally found to be sufficiently stringent and severe against those on whom they are intended to operate, without adding judicial construction by presumption to special legislative enactment.

Several other points were presented, and decided by the

court below to which the defendant then excepted. But as there is error in the action of the court by refusing to dissolve the attachment and instructing the jury that the action of debt was maintainable in the case we think it unnecessary to consider them here.

Judgment reversed.

Johnson & Matthews and *R. P. Lowe*, for plff. in error.

L. H. Reeves, for defendant.

WRIGHT *v.* MILLARD.

The act passed for the benefit of settlers on the "Half Breed Lands" in 1840, cannot be interposed against a title confirmed by the judgment of partition in *Spaulding* et. al. v. *Antonya, et. al.* Said act became inoperative by its own limitation, as soon as the title to said "lands" became settled by due course of law.

A statute in derogation of common law should be strictly construed, and confined to the object of its enactment.

The judgment of partition absolute.

ERROR *to Lee District Court.*

Opinion by KINNEY, J. Millard sued Wright before a justice of the peace in an action of trespass for injuries upon his lands; by cutting timber, and carrying off rails. Wright recovered judgment for costs. Millard appealed and obtained judgment for nominal damages in the district court, to reverse which Wright brings the case to this court, on writ of error.

From the record it appears that the parties resided on what is commonly called the half breed tract.

In the year 1840, the legislature of the territory of Iowa, passed the following statute for the benefit of settlers on the half breed lands: "That it shall be lawful for any settler on the half breed lands, to select not to exceed one section of land in said tract, a part of which may be prairie and a part timber, provided he has an interest in or a title to said land by paying a tax on the same, and providing further, that he shall not in his selection interfere with the claim of any other settler on said land. And in order that the settler may hold his claim peaceably, quietly, and undisturbed until the perfect title is ascertained and settled by the due course of law, it shall not be deemed necessary for him to enclose more of said land than may suit his convenience, and his receipt for taxes from the proper officers, shall be regarded as sufficient evidence of title and ownership, as to authorize him to commence and sustain his action for any wrongs and trespasses committed upon his claim as set fourth in the 1st § of the act." Laws of 1840, p. 19, § 1 and 2.

From the bill of exceptions, it appears that the defendant Wright, introduced testimony tending to prove, that he settled upon the half breed lands, in 1837, and selected half a section lying in a body, part prairie, part timber, for the purpose of a farm, of which the premises described in the plaintiff's complaint, upon which the trespass is alleged to have been committed, constituted the timber part. He also proved the building of a house upon the prairie part; occupancy of the same; the cultivation of the prairie, and possession up to the time of trial; also, that he had used the timber off from the land, claimed by plaintiff, for the purpose of making his improvements. The defendant also introduced the tax receipts from the proper officers of the county, of taxes by him paid on the land described in the complaint of plaintiff for each successive year, from 1837, to 1845 inclusive.

To rebut the evidence introduced by the defendant below, and to show that the perfect title to the half breed lands had

been ascertained and settled by due course of law, and that said tax receipts had ceased to be evidence, for the defendant under said law at the time of the alleged trepass the plaintiff offered in evidence a certified copy of the record of the proceedings and decree in the case of *Josiah H. Spaulding* and others *vs. Euphrosinie Antonya* and others for the partition of said half breed lands, a copy of which is made part of the record in this case.

Three several bills of exceptions were taken on the trial by the plaintiff in error, but the refusal of the court to give the following instruction, is alone relied upon for a reversal of the judgment: "That if the defendant selected the said premises at an early time in the settlement of the half breed tract, as a part of his farm, and paid the taxes on the same regularly, that such selection and payment of taxes, gives the defendant possession of said premises even without an enclosure."

This instruction was properly refused to be given to the jury. The statute being in derogation of the common law, must not only receive a strict construction, but must also be confined in its application to the object and purposes for which it was enacted. Various and conflicting titles were set up to that portion of Lee County, known as the half breed tract. At the time this law was passed, there had not been any adjudication upon these titles. Much of the land was occupied by individuals whose only color of right was their possession, and this at common law could not extend beyond their enclosures.

Prior to the enactment of the statute, trespass could only be maintained for an injury to the enclosure, by those settlers who were in possession without color of title, but the statute steps in, and extends the action to all those who claim and pay taxes on a section of land, although the same be not enclosed. But this statute is limited in its provisions, and is only made operative until the occurrence of a certain contingency. That contingency is the settling of the title

by due course of law. That due course of law is an adjudication by a court of competent jurisdiction. The judiciary of the country can alone try, determine and settle conflicting titles to land. No other power or authority can be invoked for this purpose. From the courts, and from the courts alone must emanate proceedings and action, which is to settle and perfect title to lands which the legislative branch of the government by passing the act, presupposes to be in dispute and undetermined. Was then the perfect title thus ascertained and settled? If so the statute was no longer in force. It had expired by its own limitation. By the decree of partition introduced by the plaintiff below, it appears that the tract was divided into one hundred and one shares and partitioned and set off to the respective owners. This proceeding and final action of the court as has been decided by this court, was an ascertainment and settlement of the title. While that judgment remains it is absolute verity and must receive full faith and credit as the judgment of the court, whenever attempted to be enforced. Nor does it matter that bills are pending to impeach or vacate it. While it remains the judgment of the court it is operative and effectual and must be regarded as a settlement of the title by due course of law as contemplated by the legislature.

From these views it follows that the title being ascertained and settled, the period for which the statute was passed had expired at the time of the commencement of the suit, and Wright not exhibiting any title to the land on which the alleged trespass was committed, and the same not being in his possession by enclosure, the statute affords him no protection.

The court did not err in refusing the instruction.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

Geo. C. Dixon, for defendant.

HUMMER *et. al. v.* LOCKWOOD.

A special contract for work must prevail unless the departure from it has been so great and general as to render it impossible to connect the contract with the work, or to determine to what part of the work the contract can apply.

Such a contract should regulate the estimates of measure and value.

ERROR *to Lee District Court.*

Opinion by GREENE, J. Lockwood sued Hummer and Lowe in assumpsit for work, labor and materials furnished to them under a written contract. The declaration contains special *indebitatus* and *quantum merrit* counts. The general issue and special pleas were interposed. Verdict and judgment for plaintiff.

Among the errors assigned, there is but one upon which a decision is necessary. In that, it is contended that the court erred in charging the jury that: "If there has been a special contract fixing the price of the plastering, and that special contract has been abandoned and departed from by the defendants so as to change the character or quality of the work, such special contract is not so binding upon Lockwood as to prevent him from recovering the customary price therefor, though it may exceed that agreed upon." This instruction assumes that an abandonment or departure from the special contract, which may change the character or quality of the work, will entirely dispense with the stipulations of that contract. Such we think is not the law. A mere change in the character or quality of work will not abrogate the contract under which the work is done. To justify this, the change must be so great and so general as to render it impossible to connect the contract with the work, or to determine to which part of the work the contract can apply.

The rule laid down by Chitty is universally adopted by

common law tribunals. "If a man contracts to work by a certain plan, and that plan be so *entirely* abandoned that it is *impossible* to trace the contract and say to which part of the work it shall be applied, in such case, the workman shall be permitted to charge for the whole work done by measure and value as if no such contract had been made." Chitty on Con. 168.

Under this doctrine it is obvious that the instruction referred to is erroneous. The words "abandoned and departed from" are qualified by the words, "so as to change the character or quality of the work." It was in effect then the same as if the court had instructed, "that if the contract had been so far abandoned and departed from as to change the character or quality of the work, it should not be observed." This falls far short of the rule which requires the plan to be so entirely abandoned as to render it impossible to trace the contract with the work performed.

So far as applicable such a contract should regulate and control the estimates, and thus the measure and value, intended by the parties will be most likely to prevail.

As the instruction was material and calculated to mislead the jury, the judgment must be reversed and a trial *de novo* awarded.

Judgment reversed.

R. P. Lowe, for plaintiff in error.

J. Matthews, for defendant.

Dougherty *et. al. v.* Hughes.

A bank certificate of deposit, is not money or its equivalent, and not available to redeem land sold on execution. Greene, J. *contra.*

In redeeming land a *penalty* of ten per cent. required on gross amount, and not an *annual interest* of ten per cent.

In Equity. *Appeal from Lee District Court.*

Opinion by Kinney, J. Bill filed by Dougherty, setting forth among other things, that Hungerford and Livingston at the October term of Lee district court, 1841, recovered judgment against John Hillis for $573,94; that execution was issued and Rapids Hotel levied upon and sold for $622,89, 9th December, 1842, to said H. & L.; sheriff gave to purchaser a certificate of sale, subject to redemption by Hillis and his creditors. That at October term, 1842, a judgment on a mechanics lien was obtained on said property for $237,39; said execution issued, and property sold 4th March, 1843, to S. W. Powers for $233,18, and sheriff gave Powers a certificate, subject to redemption, &c. Complainant at April term, 1843, obtained judgment for $710 against said Hillis; that to secure said judgment, Hillis having no other property but the Rapids Hotel, complainant took an assignment of Power's certificate by purchase on 5th March, 1844, for consideration of $290,50. Said Hillis not redeeming from Hungerford and Livingston's sale within twelve months, complainant as judgment creditor of said Hillis for the sum of $710, did, on the 7th March, 1844, pay to Stotts sheriff, for the use of said H. & L., the sum of $696,18, being the amount required to redeem same, and sheriff gave to complainant a certificate of redemption. This is all that is necessary to state in relation to the pleadings, to a proper understanding of the point in this case. This redemption so called by the complainant, was by a bank

certificate of deposit. Could the property be so redeemed. We think not. It was not money, nor its equivalent.

Dougherty as judgment creditor of Hillis, had a right to redeem the property from the judgment of H. & L., and the amount of the certificate of deposit was sufficient for such redemption, as the ten per cent. required to be paid by the statute, is as a penalty upon the gross amount, and not annual interest as was contended at bar. The only difficulty is, he did not redeem in money, or its equivalent. Money is current coin of the United States. The equivalent to money must be that which answers all the purposes of money. Certificate of bank deposit will not circulate as money. It has not the same exchangeable value. It is not a part of the circulating medium of the country. The mere fact that the sheriff received the certificate of deposit will not bind the defendants. If he received any thing but money, or its equivalent, and therefore gave a certificate of redemption, he was acting without authority of law, and the defendants cannot be injured, or their right to the property effected. If the sheriff had received bank notes, constituting to a great extent the circulating medium of the country, the case would have been different. But this certificate of deposit may, or may not be paid. It may answer the purpose of money, or it may not. It might suit some persons, and others might utterly refuse to take it. As a circulating medium, or as a tender for the payment of debts, it is not money or its equivalent.

Mumfort v. *Armstrong*, 4 Cow. 553; *Dickinson* v. *Gilliland*, 1 ib. 481. This is a well considered case in principle and analagous to this case.

It was urged in the argument—being a case of redemption of land from sale—that the sheriff might have received a part, and given credit for the residue, or indeed that it was in his discretion to have dispensed with the payment of the money altogether, trusted the creditor, and assumed the debt himself.

But the court say, that there is nothing clearer than that a special agent must conform to the authority with which he is clothed. If he does not, his acts are void. The power of the sheriff here is in very close analogy to that of receiving money of a defendant, who is arrested upon a *ca sa.* The sheriff or the plaintiff's attorney, may receive the money, and discharge the defendant. Yet the actual receipt of the money, is a condition of the discharge, with which they cannot dispense; *Kellogg* v. *Gilbert*, 10 John. 220; *Cadwix* v. *Field*, 9 ib. 221. If the certificate of deposite had been accepted by the person to whom the redemption money belonged, they could not afterwards object, but it was not so accepted. The true rule by which to test the matter is this. Could the sheriff have compelled the defendants to have accepted the certificate of deposite? If not, then there was no redemption. But it may be said that he could not compel them to take bank paper.

The analogy is not good, for the reason that this is the circulating medium, and by common consent, takes the place of money; and when upon solvent specie paying banks, is convertible into money; and in the language of the books is equivalent to money.

The majority of the court are of the opinion that the court were right in deciding that there was no redemption, and in dismissing complainants bill as to Hughes, Chittenden and McGavic, and ordering Stotts to refund.

Judgment affirmed.

Dissenting Opinion by GREENE, J. It is conceded by my brother judges that land sold on execution may be redeemed by money or its eqivalent, but they decide that a bank certificate of deposit, is neither the one nor the other; still they admit that bank bills would be an equivalent. I am not able to discriminate this paramount value of a bank bill over a *bank* certificate. The former often issues on less than one-third of its face in money; the latter is issued only on a

deposit of the full amount named and acknowledges a deposit of the full amount in money, subject to the indorsee or holder, on demand. Wherein is the disparity? Neither the bill nor the certificate would make a legal tender. The sheriff was not required to take either. But surely he might with as much propriety take the one as the other. As the sheriff accepted the certificate, he virtually received the amount in money; as so much money in bank, deposited to his credit and subject to his order. It was not only equivalent to, but it was in fact, so much money; because he took the deposit and made the depositary his own by accepting the certificate. The opinion admits that if the parties entitled to the redemption money had accepted the certificate, it would have been valid. Surely then the acceptance of the sheriff the party legally authorized to receive the money, and the legally constituted agent of the party entitled to the money, made it good. *Qui facit per alium facit per se.*

The sheriff and his sureties were legally responsible to that party for the money.

The sheriff having received the certificate as so much money and having executed a certificate of redemption, it should be regarded as conclusive and valid.

It is not pretended that the bank certificate was dishonored, or spurious, or fraudulent; and to my mind the record discloses no reason for disturbing the certificate of redemption; nor do I consider the authorities cited in the opinion applicable to the case.

H. T. Reid, for appellant.

Geo. C. Dixon, for appellee.

NIGHTINGALE *v.* WALKER.

If the grantor conveys to the grantee the same lands that were conveyed to grantor by a deed clearly designated and of record in which the land is fully described, the discription is made good by such reference.

ERROR *to Lee District Court.*

Opinion by GREENE, J. An action of right by John M. Walker against John Nightingale. Verdict and judgment for plaintiff.

The defendant now claims that the court below erred in admitting certain deeds in evidence, which were offered in support of the plaintiff's title. The only objection we are called upon to notice, is the defective description of land in the conveyance from Field to McKee. In this deed Field sells to McKee all his "right and title in and to the lands and tenements I bought from Uriel Wright, Esq., for his one undivided share in the half breed tract of land lying and being on the Des Moines and Mississippi rivers, for and in consideration of the sum of one hundred dollars to me in hand paid by the said John McKee, the receipt whereof, I do now fully acknowledge, that the said McKee and his assigns may have and hold all the said land, the same as I bought it from said Wright, reference to his deed of record at or near Fort Madison, Iowa, will more fully show."

The description of land in this deed is altogether vague and insufficient; but it refers to a deed from Wright to Field, in which the land is described with certainty. The deed from Field to McKee expresses the intention of the grantor to convey the same land on the half breed tract that had been conveyed to him by deed from Uriel Wright as recorded. That deed was also produced in evidence containing a full and specific description of the land. In order to

ascertain the intention of the parties, these deeds should be considered together. The deed from Field refers to and adopts the description contained in the deed from Wright to him and thus the land intended to be conveyed is clearly ascertained.

In *Allen* v. *Bates*, 6 Pick. 460, it is held that the description in a deed, referring to another deed, may be made sufficiently certain by the reference. To this rule we can see no valid objection. It is not repugnant to the established doctrine of construction, nor to any authority to which we have had access.

By a proper reference of one deed to another, the description in the latter may be considered as incorporated in the former, and both be read as one instrument for the purpose of identifying the property conveyed or to correct any inaccuracy or deficiency in the description; *Everett* v. *Thomas*, 1 Iredell, 252; *Ritter* v. *Barrett*, 4 Dev. and Batt. 133; *Field* v. *Huston*, 8 Shep. 69.

We are clearly of the opinion that the deeds in the present case were correctly admitted in evidence.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

L. R. Reeves, for defendant.

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JOHNSON *v.* WILLIAMS.

Husband not liable, by mere implication of law to an attorney for services rendered to his wife in obtaining a divorce from him.

Such professional services not to be regarded as necessaries.

ERROR *to Lee District Court.*

Opinion by KINNEY, J. Suit brought by Johnson to recover six hundred dollars, which he alleged to be due for professional services as the attorney and solicitor of Sarah Williams the wife of the defendant.

By the bill of particulars filed, it appears that the services were rendered in a suit brought by the wife for divorce.

On the trial the plaintiff's counsel prayed the court to give the following instruction: "That a husband is by law liable on an implied promise to pay lawyers, and officers of the court, for their reasonable charges and fees, for services rendered to the wife in prosecuting her right to divorce and alimony, upon the ground of necessaries; which instruction the court refused. But instructed the jury that the defendant was not liable for professional services rendered to the wife of defendant in procuring a divorce and alimony, if such divorce and alimony are obtained, unless he was employed by defendant, either in person or agent, or unless defendant promised to pay, or unless he was ordered to pay for such services by the court. The refusal to give the instruction asked, and the instruction given by the court, are assigned for error.

We think the court ruled correctly. Without an express or implied promise on the part of the husband to pay the debts of the wife, he is only bound for necessaries. In law the term "necessaries" is understood to mean not only articles which are of absolute necessity, but also such things as are suitable to the fortune and condition of the person to whom they are supplied; *Seaton* v. *Benedict*, 5 Bing. R. 28; Story on contracts, § 98, p. 102. Are the expenses incurred in carrying on a law suit for a divorce, necessaries, according to the technical legal meaning of that word? After a careful examination of the elementary works and reports

upon the subject of the liability of the husband for the debts of his wife, we have not been able to find an author or an adjudged case, that regards the expenses of such suit in the light of necessaries. It has been the custom of courts after granting the wife a divorce, to decree an allowance in favor of her attorney. This in some states is regulated by statute, in others by uninterrupted custom, but we find no case where the husband has been sued and a recovery had upon the ground of necessaries. The wife did not bind the husband as his agent, for it is a well settled rule, that the wife can only bind the husband by her contract as his agent acting under his authority or with his concurrence, express or implied. Story on Contracts, § 96, p. 100. The husband—the defendant—then was not liable as for necessaries, nor upon the authority of the wife to employ counsel as his agent, without proof that she had such authority, or that he concurred in her acts in that particular.

Judgment affirmed.

J. Matthews, for plaintiff in error.

Geo. C. Dixon, for defendant.

McCormick v. Bishop.

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When an appeal from a justice of the peace was taken subsequent to the day of judgment, notice of such appeal should be served upon appellee at least ten days before the trial term in the district court, unless appellee waives notice by appearance.

ERROR *to Lee District Court.*

Opinion by GREENE, J. Bishop and Wiswell sued John McCormick before a justice of the peace in an action of assumpsit. Judgment was rendered against the plaintiffs and they took an appeal to the district court. At the first term the case was continued, and when it came up for trial at the next term, it appeared that the appellee had not been served with notice of the appeal, and had made no appearance in the district court, but the appelant insisted on going to trial, and thereupon recovered judgment against the defendant. The question is now presented, did the court below err in rendering judgment against the defendant without notice or appearance?

The statute provides that if the appeal is not allowed on the day "judgment is rendered, the appellant shall give the appellee at least ten days notice in writing, before the sitting of the court at which the cause is to be determined;" that the notice may be served in like manner as an original summons, and that if notice is not given as required, the cause shall, on application of the appellee, be continued, but that no appeal shall be dismissed for want of such notice. Rev. Stat. 335. § 13–14.

This statute clearly requires notice or contemplates the appearance of the appellee in all cases where the appeal is allowed after the date of judgment; and requires the notice to be given at least ten days before the term, at which the cause is to be determined.

If the continuance had been granted on the application of appellee, that would have shown an appearance, and no notice would have been necessary to justify a trial of the cause at the next term of court. But there was no such appearance, and hence the notice should have been served

upon appellee at least ten days before the term of court at which judgment was rendered.

It is obvious that a continuance of the cause on motion of appellants, or by order of the court without motion, cannot supercede the necessity of notice. The notice should be served in all such cases, unless the appeal is taken on the day judgment is rendered, or unless appellee waives notice by appearance.

True under the statute the appeal should not be dismissed for want of such notice; but it is equally true that a valid jugdment cannot be rendered against the appllee without either notice or appearance.

Judgment reversed.

J. C. Hall, for plaintiff in error.

C. Mason, for defendant.

LEE COUNTY *et. al. v.* DEMING.

By act of 1848, the district court of Lee county, was authorized to hold terms at Keokuk, provided the city furnish the necessary rooms free of charge; held that the county is not liable for the rent of such rooms.

ERROR *to Lee District Court.*

Opinion by KINNEY, J. Action of assumpsit brought by defendant in error against the commissioners for the rent and occupation of a room in the city of Keokuk, for the purpose of holding a term of the district court. Plea general issue. The case was submitted to the court below, upon a written agreement, in which it is agreed by the parties, that at the January term of 1850, the judge of the district

court directed the sheriff of the county to procure a suitable room in the city of Keokuk, in which to hold said term of court, and that in pursuance of said direction the sheriff engaged a room at three dollars per day, and that the court occupied it twenty-two days. Upon this agreed state of facts, the court decided that the county was liable and accordingly rendered judgment in favor of the defendants in error. It is contended that this decision is erroneous. An act regulating and fixing the time and place of holding the district court, in and for the first judicial district, approved January 24, 1848, provides for the holding of a court in the city of Keokuk; *Provided*, that the authorities of the city of Keokuk shall furnish free of charge the necessary rooms for holding court in said city. Anterior to the passage of this law the courts for Lee County were exclusively held at Fort Madison, the county seat. At that place the county had erected a court house where the county business was transacted. The law of 1848, does not seek to change the county seat, but merely for the convenience of the citizens of the city of Keokuk, and the immediate vicinity, the legislature permitted the courts to be held there and at Fort Madison alternately. But as the county had already erected a court house at a point suited to the convenience of the people, no additional expense to the county by way of a building or room for holding the court was to be incurred. The legislature by express provision, guarded against any expense to the county in consequence of establishing a court at Keokuk, by requiring the authorities of that city to furnish the necessary rooms for holding court free of charge. But it is said that the sheriff under the direction of the court engaged the room and as he was an officer of the county, that the county commissioners are liable.

The sheriff had no right to make a contract even under the direction of the judge, binding upon the county, unless authorized to do so by law. The board of county commissioners could make contracts only by virtue of the power

conferred upon them by the legislature, and inasmuch as they did not possess the power to contract for a room in Keokuk for holding court, the sheriff certainly had no such power and they cannot be liable. The law fixing the court at the city of Keokuk, virtually declares that the county shall not pay the expense of the rooms for holding court, consequently any act of the commissioners assuming liability would be in violation of the law, and therefore of no effect. If the board of commissioners could not make a contract by which the people should be obliged to pay for the use of the room, most certainly any contract that the sheriff would make would not be binding upon the county. But it is said that the city of Keokuk without her consent cannot be compelled to pay for the use of the room, and hence the defendants in error are without remedy unless the county is liable. With that question we have nothing to do. If true, and if the defendants have no remedy, it is no argument in favor of the collection of a debt against a party that did not and could not assume any liability in the premises. We think that the court erred in rendering judgment against the county.

Judgment reversed.

J. C. Hall, for plaintiff in error.

R. P. Lowe, for defendant.

Morrill *et. al. v.* Miller.

Where a judgment exceeds the verdict in amount, it will not be reversed, if the excess is remitted.

A trial of the right of property under attachment, is no bar to an action of replevin, for the same property.

To aid in the construction of a statute, other statutes in *pari materia* may be considered.

Error *to Lee District Court.*

Opinion by Greene, J. Replevin commenced by Milton M. Morrill against Peter Miller, Lee McGavic and James Chittenden. The case was tried below upon an agreed state of facts, by which it appeared that the property taken in this replevin suit had been previously taken by virtue of a writ of attachment in favor of W. P. Cowles against F. Hall; that the property was thereupon claimed by the plaintiff to this suit, and a trial of the right of property was had at the April term, 1848, of the Lee district court, and by the verdict of a jury and the judgment of the court, it was decided to be the property of said Hall, and it was accordingly ordered to be sold to satisfy the judgment recovered by said Cowles. The agreement stipulated, that the court should decide whether said trial of right of property is a bar to the present action of replevin, and if decided in favor of defendants, that the action should be dismissed. Upon this agreement the court dismissed the suit, and ordered a writ of inquiry. At the next term a jury was empanneled to assess the damages. The jury assessed the damages at nine hundred dollars, but upon that verdict the court rendered a judgment against the plaintiff for nine hundred and nineteen dollars.

1. The first error assigned, is that the court rendered judgment in favor of defendants for a greater amount than was authorized by the verdict. The judgment so far as it

exceeds the amount returned in the verdict is erroneous; but as the defendants have proposed a *remittitur* for the excess of nineteen dollars the judgment cannot be reversed on that account.

2. It is also urged that the court erred in deciding that the trial of right of property was a bar to this action; and in dismissing the suit. The 18th § of the valuation law is cited in support of this position. This section provides that "personal property taken by virtue of a writ of attachment may be claimed and such further proceedings thereon had as is herein provided in cases of personal property taken in execution; *Provided*, that nothing herein shall be construed to prevent the claimant of property taken as aforesaid, from seeking his remedy in an action of replevin, detinue, trespass or trover;" Rev. Stat. 634, § 18. The six preceding sections regulate the proceedings and trial of right of property, when claimed by any other person than the defendant in execution.

The proviso in section eighteen, should, we think, be construed with a relation to those preceeding sections on the same subject, and has a reference to property taken on execution, as well as to property taken by writ of attachment. The words "property taken as aforesaid" were doubtless intended to comprise that taken by either writ. It follows then, that nothing in the act in relation to such property, when claimed by a third party, can be so construed as to prevent the claimant from seeking his remedy in an action of replevin, &c. This language is very broad and explicit. It admits of no alternative construction, and proposes no exception. It unqualifiedly declares that nothing therein shall be construed against his remedy in replevin, &c. A party claiming property taken in execution or by attachment was entitled to his remedy in replevin independent of section eighteen, and might have availed himself of that remedy, or he might have had his right to the property tried, as provided in section twelve of the valuation law. If the

legislature intended to allow the action of replevin only in the event that the party did not avail himself of a trial under section twelve, that intention should have been expressed. As no such alternative or exception is provided, we must conclude that no proceeding under the act, not even a trial under section twelve, should be construed as a bar to an action of replevin, and this we think was the intention of the legislature.

This view of the legislative intention is promoted by the eighth and ninth sections of the attachment law; Rev. Stat. 79. Section eight provides, that when property attached is claimed by some person other than the defendant, the right shall be tested by a jury in the manner prescribed where property taken on execution is claimed by some stranger to the suit. The ninth section expressly declares that the verdict on such trial shall not be conclusive against either of the parties; and that the same proceedings may be instituted to obtain the property, or compensation therefor as though the trial provided had not take place. As such trial, when property is taken by attachment, is no bar to subsequent proceedings, why should it be considered a bar where property is taken on execution? If the 18th § of the valuation law is equivocal, the 9th § of the attachment law upon the same subject matter is sufficiently clear and intelligible to explain the intention of the former. The propriety of referring to other acts *in pari materia* to aid in the construction of a statute, will not be questioned. This is now among the rules of legislative interpretation; 3 Mass. 17, 21, 296; 8 ib. 418, 423; 1 Pick. 248, 254; 10 ib. 235.

The construction we have given to the statute is not without authority. In Indiana, the law declares that in all cases where a trial of the right of property has been had the decision while unreversed, is conclusive between the parties; R. C. 1831, pp. 237, 238. Still in *Chinn* v. *Russell*, 2 Black. 172, goods in possession of the execution defendant A. were levied on by the sheriff; the goods were claimed by B. and

a jury summoned to try the right of property; found that they belonged to A. In replevin by B. against the sheriff it was held that the finding of the jury was not conclusive against B. In the opinion, the court say: "We are not aware that these trials of the right of property have been ever held conclusive. If the goods be found to be the debtor's, the inquisition may show that the sheriff's conduct in selling was not malicious, but it is no bar to the action of the owner." If this decision is authorized by the law of Indiana, it should not be questioned under the statute of Iowa.

In *Van Cleef* v. *Fleet*, 15 John. 147, it was held that an inquisition taken by a sheriff on a claim of property in goods levied under execution is not conclusive of the right of property. The court declare that it would be intolerable to consider these inquisitions as decisive of the right of property, considering the manner in which they are taken and the great abuse to which such proceeding is liable. There is prehaps no such liability to abuse under the statute of Iowa. Here a change of venue, a continuance and a new trial may be awarded, or an appeal taken from the judgment of the justice in such proceedings. The statute affords every opportunity for a full and fair hearing of the claimants right to the property. Aside then from the manifest intention of the legislature and the authorities on the subject, we should be at a loss for a good reason for granting a claimant, a second action, and a second day in court to determine the same subject matter. But legislative intention and the authorities must prevail; and hence we are of the opinion that the trial provided by statute in cases like the present is no bar to an action of replevin for the same property.

Judgment reversed.

J. C. Hall and *M. M. Morrill*, for plaintiff in error.

C. Walker and *R. P. Lowe*, for defendant.

SHELTON *v.* SHERFEY.

Possession of a note payable to bearer is *prima facie* evidence of ownership, and such a note may be sued in the name of any holder.

A note made payable to J. S. or *order* and endorsed by the payee to S. T. or *bearer*, becomes, in the hands of subsequent holders, the same as a note payable to *bearer*.

ERROR *to Des Moines District Court.*

Opinion by GREENE, J. Assumpsit before a justice of the peace on a promissory note for five dollars signed by John T. Shelton, made payable to William Lewis or order, and assigned by Lewis to S. R. Thurston or bearer. Suit brought by Solomon Sherfey as bearer. Plaintiff obtained judgment by default before the justice.

In the district court, when the plaintiff offered the note in evidence to the jury, the defendant objected, but the objection was overruled, and the note admitted. This is now assigned as error. And it is urged that there is no privity between the parties, that the right of action was in Thurston and not in the plaintiff below.

It has been repeatedly decided by this court, that possession of a note payable to bearer is *prima facie* evidence of ownership, and that such a note may be sued in the name of any holder.

But the question is raised in this case, can a note payable to A. or order be so indorsed by him or his indorsee as to make it payable to bearer by mere delivery? It will not be disputed that the note might have been indorsed in blank and thus any holder as indorsee might sue on it in his own name, or in the name of the payee for his use. So far as the rights and liabilities of the maker are concerned it could make no difference whether the note was assigned in blank or to S. R. T. or bearer, or to bearer only. The promise in the note is not limited to any particular person. It is first

to W. L. and second to any other person or persons, he may order payment to specially, or refer to as indorser or holder generally, by an indorsement in blank or to bearer; and as he indorsed the note to W. L. T. or bearer, it is clear that it became payable to any person as indorser who might be in possession of the note. The rule appears to be well approved by courts and the commercial world that in an action on a negotiable note by an indorsee against the maker, the presumption is that the note was negotiated in the usual course of business and came regularly into the hands of the holder. As nothing appeared in the present case to disturb this presumption, there is no reason why the note should not be admitted in evidence to support the action of the holder against the maker.

Judgment affirmed.

D. Rorer, for plaintiff in error.

J. C. Hall, for defendant.

PILES *v.* CHARLES.

Where by argeement, the defendant was permitted to take a change of venue, in time for trial at the next term, but neglected to do so; held that it was not error to refuse his motion for a change of venue at a subsequent term.

ERROR *to Lee District Court.*

Opinion by GREENE, J. This was an action of right commenced by Salem Charles against Richard Piles. The defendant applied for a change of venue on the ground of prejudice in the district judge.

It appears by the bill of exceptions that after the defendant filed his affidavit for a change of venue, it was agreed by the attorneys of the parties that the cause should stand continued until the next term of the court; and that if the change of venue is taken, it should be taken in time to be tried at the February term of the district court of Van Buren County. This agreement was entered upon the judge's docket. The change of venue was not taken, and at the April term of the Lee district court, when the case was called in its order for trial, the defendant moved the court to grant the change of venue, which was overruled. This is now assigned as error.

Had there been no agreement of the attorney's in relation to the change of venue, the proceeding would have been erroneous. But the whole matter appears to have been arranged by the attorney's. From the agreement, we infer that the defendant had not fully concluded to take the change of venue; that he was allowed time to consider upon it, and if he concluded to do so, he could take the case, by consent and agreement to the Van Buren district court, if taken in time to be tried, at the February term of that court. By this agreement the defendant had the power to take the case to another venue within the time stipulated, and upon that arrangement he appears to have rested his application without an order from the court, granting the change. As it might have been made under the agreement, we are of the opinion that there was no error in omitting the order. As the defendant did not avail himself of that agreement, the plaintiff had reason to suppose that he had abandoned his motion for a change of venue, and could not be prepared for a renewal of that motion when the case was called up for trial. It must be presumed that the plaintiff came into court prepared for trial, and had no notice of the defendant's intention to urge his previously abandoned motion to change the venue. We think then that the court below very properly regarded the venue motion as unauthorized,

and did not depart from a sound discretion in refusing to change the venue.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

Geo. C. Dixon, for defendant.

PACKER *v.* COCKAYNE.

Where the language of a lease is not clearly expressed, the intentions may be ascertained by the leading terms and conditions of the lease collectively considered in connection with the nature of the transaction.

In a farm leased for a term of three years it was stipulated that the lessee should build fences, without specifying the time, held that the fencing should have been done in time for the first crop.

The lessee having abandoned the premises before the expiration of the lease; the lessor was entitled to possession and to back rents.

Strict rules of pleading not required before justices of the peace.

Objections not raised in the district court, will not be favored in the supreme court.

For labor or property payable at a particular time and place, a demand not necessary.

A court not required to give irrelevant instructions.

ERROR *to Des Moines District Court.*

Opinion by GREENE, J. This action was commenced before a justice of the peace by Cockayne to recover rent for the use of farming land. He obtained judgment before the justice, and also in the district court.

On the trial in that court the plaintiff introduced in evidence a lease which stipulated in substance that Cockayne leased to Packer about twenty-five acres of land for the term of six years, that Packer should build a good fence on three sides of the land; that he should have the whole of the crop

the first year, and give Cockayne one-third of the crop in a crib or stack each year thereafter. The lease also required Packer to break some of the ground, build a house and dig a well, and Cockayne to furnish timber for the improvements. It appears by the bill of exceptions, that Packer occupied the land and raised crops during the years of 1844, 1845, and 1846, and that the rents were duly paid for the two years last named, and that in 1847, he left the premises, and Cockayne took possession. It is claimed that the court erred in giving instructions asked by plaintiff in relation to the construction of the lease, which were to the effect that the three strings of fence were to be built so as to protect the crops of 1845, and subsequent years; that if Packer abandoned the premises, Cockayne had a right to take possession, and sue for any part of the rent due and unpaid; and that if Packer did not build the fence according to the lease, it being the pay for the first year, the plaintiff can recover the value of the rails and labor necssary to complete the fence. To these instructions various objections are raised, but we think they correctly express the intention of the parties to the lease. Although not expressed clearly nor accurately in the lease, still we think the intentions are shown, by the leading terms and conditions of the lease collectively considered in connection with the nature of the transaction. The compensation to the lessee for the fence and improvements he was to put upon the place is not expressly stipulated, but as he was to have the entire crop raised the first year without giving the lessor any portion, and as the stipulation to furnish the ground is immediately followed by one from the other party to make the improvements, it may reasonably be concluded that the one was given in consideration of the other. This construction shows a fair business transaction between the parties, and is by no means repugnant to the arrangement, and the language of the lease.

1. No time is expressly named within which the fence

should be built; can it therefore be assumed that it could be deferred till the end of the lease? Such a construction would be inconsistent with the leading object of the contract. The fence was indispensable to the raising of crops. Without the fence no benefit from the lease could result to either party. It must then have been intended as a condition precedent to the raising of even the first crop. There was then no error in the instruction that the three strings of fence were to be built so as to protect the crops of 1845, and subsequent years.

2. The second instruction admits of no doubt. It is clear that if Packer abandoned the premises, Cockayne had a right to the possession and to an action for back rents. By action of the parties and by operation of law, there was a surrender of the premises, but not a relinquishment of rent then due and unpaid. The evidence set forth in the bill of exceptions shows that there was a deficiency of four hundred rails and of one hundred stakes in the fence which was to have been made for the first year's rent. It was for the value of those rails and stakes that the plaintiff sought a recovery in this action.

3. An objection is urged to the action in this form, but as proceedings were commenced before a justice of the peace where strict rules of pleading are not enforced, and as this objection does not appear to have been raised in the district court, we cannot consider it a sufficient ground to reverse the case.

It follows from the above views that the third instruction asked was correctly given, and that the plaintiff could recover the value of the rails and labor necessary to complete the fence in payment of the first year's rent, as contemplated in the lease.

4. It is also assigned for error, that the court refused to instruct the jury, as requested, "that the plaintiff could not maintain an action for rents payable in labor or property, until a demand for the same had been made and proved.

Upon this point the court charged that such demand was not necessary if the labor or property was payable at a particular time and place." We consider this ruling correct and sanctioned by the current of authority. No reason, we think, can be assigned either in law or in fact for a demand where time and place for the performance of labor or delivery of property are stipulated in the contract. The case of *Wyatt* v. *Bailey*, Morris, 396, is not in conflict with this view. In that case there was no time or place fixed for payment, and in other cases since decided by this court, it has been distinctly held, that in promises for the payment of specific articles at a given time, a demand preliminary to the action is not necessary.

5. Another instruction asked was that defendant had the right to discharge the rent in cash, but the court charged the jury that this could not be done without plaintiff's consent. This point appears to be entirely irrelevant to the issue and having no bearing upon any question before the jury, they needed no such instruction. Even though it expressed a correct principle of law abstractly considered it was not error to refuse the instruction asked unless it was applicable to some point involved in the issue, or to some question of law in dispute. Courts are under obligations to meet and decide every legal proposition that arises in the trial of causes, but they should not be expected to instruct juries upon mere abstract propositions: 1 Dana, 35; 8 ib. 298; 4 Ham. 389; 3 Wend. 75; 1 Mis. 97; 11 Wheat. 59; 1 Halst. 132; 7 J. J. Marsh. 194; 5 Watts and Serg. 60; 3 Gil. 482; ib. 644; 16 Ohio, 324.

In none of the proceedings below do we see error sufficiently manifest to reverse the judgment.

Judgment affirmed.

M. D. Browning, for plaintiff in error.

H. W. Starr, for defendant.

COCHRANE *v.* KNOWLES.

A motion for a new trial, on grounds *dehors* the record, should be sustained by extrinsic proof.

ERROR *to Lee District Court.*

Opinion by GREENE, J. This was an action of assumpsit commenced by Knowles against Cochrane before a justice of the peace on a receipt for notes taken for collection. Before the justice the suit was dismissed, and thereupon plaintiff took an appeal.

In the district court the cause was submitted to a jury who returned a verdict for the plaintiff. The defendant then applied for a new trial, but the court overruled the motion. It is claimed that the court erred in this ruling. The motion and the reasons upon which it is founded are embodied in a bill of exceptions. The bill also contains the statement of the judge that the defendant presented nothing to the court to show the truth of the reasons assigned in the motion.

As the principal grounds for the motion are *dehors* the record, they should have been established by extrinsic proof, before they could influence the action of the court.

There is nothing in the record which shows error in the proceedings below.

Judgment affirmed.

Geo. C. Dixon, for plaintiff in error.

R. P. Lowe, for defendant.

Norris *v.* Slaughter.

A mere promise to take part of a debt for the whole, is without consideration and void.

A contract, merely executory, and without consideration, cannot be enforced; not even as a compromise for the settlement of a family difficulty.

A compromise must have been fairly and reasonably made in order to be enforced.

In Equity. *Appeal from Lee District Court.*

Opinion by Greene, J. Bill to enforce an agreement to compromise and settle all disputes between the parties and to stay proceedings at law. In the answer, defendant Slaughter admits that he obtained a judgment, execution and levy against Norris, and that he married his daughter, but denies that he bound himself to receipt for or satisfy the judgment; denies that he agreed to give complainant a receipt for any amount, and denies the contract set forth in the bill. The answer admits that there was some talk about a compromise and that the matter was discussed in between defendant and one James Craig, but postively denies that any contract was ever executed or completed. Decree below for complainant.

The depositions establish the fact that the compromise referred to in the bill and answers, was not executed; that it was a mere executory promise to release judgment upon condition that a part was paid. It appears that Slaughter had a judgment against Norris for over $800; to satisfy which, Norris was to give a note for $364, and settle some other claims which would amount in all to about $600. As Norris in part performed his portion of the contract, it is claimed that the court below was justified in rendering a decree against defendant. But it does not appear that Norris performed any part before Slaughter refused to consummate the arrangement. Besides, Norris had done nothing which he could

not readily retrace or avoid. No new or additional benefit resulted to Slaughter from this executory contract. He derived from it no benefit to which he was not before entitled. No higher security or additional obligation was to be given; but a judgment was to be surrendered for a mere promissory note and promise to settle certain claims which in the aggregate amounted to considerably less than the judgment. Where then was the consideration for this executory agreement? Clearly there was none. The maxim then applies: *Ex nudo facto non oritur actio.*

The doctrine is well settled, that a mere promise to take part of a debt for the whole, is without consideration and void. This is universally true where such naked promise is merely executory; and it has been so held repeatedly where the promise is executed. 13 John. 353; 9 ib. 333; 5 ib. 391; 14 Wend. 100; 5 Pick. 44; 2 Dum. and East. 24, 27. Smith's Leading C. 326, 330.

We are not prepared to go to the extent of some of the New York cases in declaring an executed contract void for want of consideration. There is a wide distinction between contracts executed, and those which are merely executory. A mere promise to give B. $100 is void; but a gift executed to B. cannot be recalled. So, a promise to cancel a debt or satisfy a judgment of $800, upon the payment of $600, is the same as a promise to give $200, without consideration; but an executed release of the debt, or an executed satisfaction of the judgment upon a payment of the $600, may be regarded as an executed gift of the remaining $200, and therefore valid. By many of the authorities, even this distinction has not been recognized, and still we can see no good reason why it should not prevail.

But as the contract in the present case was merely executory, and was without consideration, it cannot be enforced. As this principle has already been adjudicated by this court *Frentress* v. *Markle*; 2 G. Greene, 553, it is useless to enlarge upon it now.

The compromise in this case, it is contended, presents peculiar claims, for the interposing sanction of equity, because it is for the settlement of a family difficulty. In such a case, courts of equity will doubtless go further to sustain a compromise, than they would under ordinary circumstances; but even in a family compromise, a chancellor will not do violence to an established rule of law; he will not enforce an executory promise made without consideration. Such a compromise must have been "fairly and reasonably made" in order to be enforced. 1 Story's Equity, § 132. It must have been made. It must have been fair and reasonable. But in the present case, the compromise was not made, it was only commenced; it was not fair and reasonable, because it was without consideration.

We conclude then, that the equities of the case do not justify the decree rendered in the district court.

Decree reversed.

C. Mason and *J. C. Hall*, for appellant.

Geo. C. Dixon and *D. Rorer*, for appellee.

Greene. 3g 118 81. 91

Rivereau *v.* St. Ament.

A complaint for unlawful detainer concluded with the averment "that said defendant did refuse and neglect to quit such possession, but continued to withhold the same from plaintiff," &c., held that it sufficiently charged "that defendant detained the premises at the time suit was commenced."

Defects in complaint waived by pleading over, and cured by verdict.

A witness not required to state the very language, as testified by a deceased witness; but should give the substance of all his testimony.

ERROR *to Lee District Court.*

Opinion by GREENE, J. An action of unlawful detainer commenced by Mary L. St. Ament against John Rivereau, before a justice of the peace; and on appeal to the district court, the defendant was found guilty of the unlawful detainer, and restitution of the premises was ordered.

After the verdict in the district court, a motion was made for a new trial, and it is now contended that the court erred in overruling the motion.

1. Because the complaint is defective, as it does not state that defendant detained the premises at the time suit was commenced. The complaint contains every material averment required by statute, and alleges in conclusion that "said defendant did refuse and neglect to quit such possession, but continues to withhold the same from plaintiff," &c. We think then that the complaint is sufficient. But if it was defective to the extent claimed by counsel it was waived by his plea to the merits and cured by the verdict.

2. It is claimed that the court erred in overruling the motion, because a witness was permitted to state the testimony on the trial before the justice, of a witness who subsequently died, after witness said he could not give the statement of the deceased witness in his own language.

It appears by the bill of exceptions, that the witness said that he could give the substance of the deceased witnesse's testimony in reference to rent, but could not give it in his language. The substance of the testimony is all that could be required. The very words of a deceased witness could seldom be remembered, and if required, it would, in effect, exclude testimony of this character. It is true that formerly the rule prevailed, that the witness must repeat the precise words testified by a deceased witness on a former trial. But courts soon found it neces-

sary to depart from this strictness. It is now considered sufficient if the witness is able to state the substance of all that was sworn, by deceased witness, on the former trial. *Cornell* v. *Green*, 10 Serg. and R. 14, 16; *Chess* v. *Chess*, 17 ib. 409, 412; *Jackson* v. *Bailey*, 2 Johns. 17. Greenl. Ev. § 165.

The other objections urged to the proceedings below are considered immaterial.

Judgment affirmed.

L. R. Reeves, for plaintiff in error.

R. P. Lowe, for defendant.

Cooper *v.* Armstrong.

An action of partition should be brought up by writ of error, and not by appeal.

The action of partition a mixed proceeding, of law and equity, in which the equity powers are made subservient to the statute and to common law rules.

Partition suits can be adjudicated in the supreme court on errors at law only.

The law and equity jurisdiction of the supreme court should be kept distinct, under the constitution.

Law and equity not to be blended in the same action.

Whether the grantor of a deed was a minor, is a question of fact to be decided by a jury. If decided by the court, it will be presumed that the question was by agreement submitted to the court, and that the court decided correctly.

ERROR *to Des Moines District Court.*

Opinion by GREENE, J. This suit was commenced by John H. Armstrong, against Edwin H. Cooper and others for a partition of real estate. The petitioner derived title to the lots in controversy, by a deed from E. H. Cooper, who in the court below resisted the partition on the ground that at the time he executed the deed to Armstrong he was under twenty-one years of age. Depositions were taken by both parties in relation to the alleged minority. The court found for plaintiff and rendered a judgment of partition.

The case is brought to this court by appeal. It should have come by writ of error. Rev. Stat. 465, § 63, 64. But as it is agreed by counsel that the case shall be considered here on writ of error, we will entertain jurisdiction.

Before proceeding to the merits, a preliminary question must be determined. Should we try the case anew as in equity, or upon errors at law?

We have already decided in *Wright* v. *Marsh*, *Lee* and *Delavan;* 2 G. Greene, 94, 106, that in partiton proceedings the jurisdiction of the district court is three fold.

1. Cumulative and special as created by statute.

2. Having full chancery attributes, except as otherwise provided by the act.

3. General common law authority so far as it could be exercised with the two preceding powers. It is a mixed proceding, but still, one in which, the exercise of equity powers, is made subordinate to the statute, and to common law rules.

By the act, the court is authorized to exercise equity powers except as therein otherwise provided; and still most of the proceedings provided by the act, are at law, and not in chancery.

Besides, the act makes no provision for a trial anew in

the supreme court, or for an appeal as in equity practice. But it provides that upon any final judgment "a writ of error may be brought by any of the parties to such judgment either jointly or separately, in the same manner as in personal actions;" and also, that "errors may be assigned upon such writ for any erroneous adjudication upon the rights of any of the respective parties, and the court shall direct the person, whose interest is affected by such adjudication to appear in such cases as a defendant in error" Rev. Stat. § 63, 64. Such a case cannot come before us as an appeal in chancery. It can only come on error, "as in personal actions," and only tried "for any erroneous adjudication," and the party affected by the adjudication and who does not sue out the writ of error is to appear, "as a defendant in error." This court, then, is only authorized to adjudicate partition suits, on errors at law.

By the constitutian of Iowa, a marked distinction is made between law and equity. In this court at least the two jurisdictions should be kept distinct and not be confounded. Art. 5, § 3 of constitution, declares that "the supreme court shall have appelate jurisdiction only in all cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe." Code 553. Under our territorial organic law, the two jurisdictions were separate and independent.

The general assembly have, as we have shown, prescribed a restriction, upon the jurisdiction of this court in partition suits, to the effect that it shall be for the correction of errors at law.

The distinction which we here make in relation to the law and equity jurisdiction of this court, is fully sustained in *Bennett* v. *Butterworth;* 11 Howard, 669. In that case it was held that as the constitution of the United States has recognized the distinction between law and equity, it must be observed in the federal courts. This distinction is recognized in Art. 3, § 2. Which declares in relation to the supreme

and inferior federal courts, that "the judicial power shall extend to all cases in law and equity arising under the constitution," &c. The constitution of this state goes further, and makes the distinction more obvious, not only in our supreme court, but also in the district courts and before justices of the peace. See constitution, Art. 5, § 3–4, and Art. 11, § 1. But so far as this court is concerned, it is clear, that the constitution does not authorize legal and equitable claims to be blended together in one suit. Here, a legal title must be determined by rules of law, and an equitable right by chancery jurisprudence.

As this case can only be adjudicated on errors at law the only question to be considered, is, did the court below err in receiving as evidence, the deed made by Edwin H. Cooper to John H. Armstrong? This deed was objected to on the ground that it was executed by Cooper while a minor, and was disaffirmed by him after he became of age. The deed was executed August 22, 1848, and the notice of disaffirmance was served May 4, 1849.

Was the grantor a minor at the date of the deed, is a question of fact, and an issue upon it in a partition suit, should be tried by a jury, unless the parties interested should otherwise agree. Rev. Stat. 461, § 16. As this issue was not submitted to a jury, we must presume that the parties agreed to have it tried by the court. Upon the evidence, the court found that the grantor was not a minor as alleged and thereupon admitted the deed.

This finding must be regarded as a verdict, and the question presents itself, is there anything of record which will justify its disturbance? The only objection urged is that the depositions which are admitted as of record in the case, do not sustain the finding. Even if this was true, it could not avail the plaintiff in error, because he took no exception to the verdict or finding of the court below. He does not show that all the proof is before us. He did not demur to the evidence, nor move for a new trial, nor for a judgment *non obstante veredicto*.

Finally, there is nothing of record which shows error in the proceedings, and the maxim must prevail—*omnia praesumunter vite esse acta*—"all acts are presumed to be rightly done" until the contrary is shown.

Judgment affirmed.

J. C. Hall and *C. H. Phelps*, for plaintiff in error.

C. Mason and *D. Rorer*, for defendant.

CROW *v.* FRENCH.

If the appellant neglects to file his recognizance, in the district court, within the time granted, it is not error in the court to dismiss the appeal.

ERROR *to Lee District Court.*

Opinion by GREENE, J. Assumpsit on a promissory note. Action before a justice of the peace. Judgment for plaintiff, and an appeal taken to the district court.

In that court, a motion was made to dismiss the appeal on the ground that a sufficient appeal bond had not been filed. It was therefore ruled that the appellant should file new recognizance by the time the case was reached in order, or that the appeal should be dismissed. The rule not having been obeyed, the appeal was accordingly dismissed. On the next day, counsel moved to have the cause reinstated, upon filing sufficient recognizance, but this motion was overruled. It is now contended that the court erred in dismissing the appeal.

There is no foundation for the objection urged. The court could not have decided differently under the statutes. An opportunity was afforded the appellant to perfect his

recognizance. The statute provides that no appeal shall be dismissed on account of a defective recognizance, "if the appellant will, before the motion to dismiss is determined enter, before the district court, into such recognizance as he ought to have entered into before the allowance of the appeal and pay all costs that shall be incurred by reason of such defect or omission." Rev. Stat. 335, § 11.

The fact that the case came on for hearing sooner than counsel advised or expected, and during his absence from court, is not sufficient reason for neglecting to comply with this statute, within the ruling of the court. In this case the new recognizance was not filed in time, nor does it appear that the necessary costs were paid. The filing of a new recognizance the day after the cause was disposed of and the absence of appellant's attorney at the trial are not sufficient reasons for disturbing the sound discretion of the court below, in refusing to reinstate the case.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

Geo. C. Dixon, for defendant.

RIFE *v.* INGHRAM.

The clerk may assess damages under such computation as the court may direct, in a case where the facts were submitted to the court.

ERROR *to Des Moines District Court.*

Opinion by GREENE, J. Assumpsit on promissory note. Judgment for the plaintiff.

The only error complained of is that the clerk assessed damages. It appears that the parties submitted the cause to the court and it being adjudged that the plaintiff was entitled to recover on the note, the court ordered the clerk to assess damages. In this proceeding we think there is no error. The record denotes an agreement of the parties to submit the facts in the case to the court. This is authorized by statute. Rev. Stat. 470, § 9. The court decided the question at issue and directed a computation of damages. This having been done under direction of the judge, by his clerk, was virtually the action of the court, and is all the statute requires. Judgment affirmed.

D. Rorer, for plaintiff in error.

Grimes and *Starr*, for defendant.

WILSON *et. al. v.* KNIGHT.

A defective notice cured, by going to trial on the merits, without exception to the ruling of the court in relation to the notice.

When a trial is required within five days after notice, a notice on the fifteenth brings the twentieth, within the five days.

Where an appeal bond is not in form or substance a recognizance such as is required by statute for appeals from justices of the peace, it is error to render judgment against the sureties in the summary method directed against sureties in a recognizance. Rev. Stat. 336, § 16.

ERROR *to Lee District Court.*

Opinion by GREENE, J. This proceeding was commenced under the statute by Curtis Knight who claimed goods levied upon by virtue of a writ of attachment. The plaintiff obtained judgment before the justice of the peace. The cause was taken by appeal to the district court where the

defendant moved to dismiss the suit, alleging that legal notice had not been given by the claimant, and that the justice had not fixed the time for trial within five days after the claim was filed in his office, as provided by statute. Rev. Stat. 332, § 12.

Before this motion was filed there appears to have been a rule on the justice to perfect his returns and while the motion was under advisement the rule was answered, and a corrected transcript filed. The original and amended returns contain sufficient to show that legal notice had been given. The court therefore very properly overruled the motion to dismiss. But if the notice had not been sufficient, the plaintiff in error waived the objection, by going to trial in the district court upon the merits, without reserving any exception to the ruling of the court upon the motion. This implied acquiescence in that decision, removes the other objection that the day had not been fixed for trial within the time limited by law. Besides, the day fixed for trial was within five days after the day on which the notice was filed. The notice was filed on the fifteenth, and the twentieth of the same month was the day of trial. Exclude, agreeable to the former ruling of this court, the day of filing, and the day of trial still comes within the five days.

The judgment against said Jones D. Wilson in the court below is therefore affirmed. But as judgment was also rendered against his securities in the appeal bond, and as this bond is not in form or substance a recognizance entered into before the justice, and attested by him as provided by law, Rev. Stat. 334, § 2, 3, and as the statute—p. 336, § 16,—authorizes judgment on appeal against securities in such recognizance only, the judgment as to Reeves and Johnson, as securities in the bond, is reversed at the cost of defendant in error. Judgment reversed.

L. R. Reeves, for plaintiffs in error.

C. Mason and *D. F. Miller*, for defendant.

Garretson *v.* Vanloon.

In equity, *time* not usually regarded as essential, where circumstances of a reasonable nature, prevent performance within the time stipulated.

Time may be made material by express agreement, or by the nature of the contract if so intended by the parties.

When a bill is not sworn to, nor supported by proof, the facts averred in the answer and sworn to, are to be taken as true upon all points responsive to the bill.

Interest, not always an equivalent, for default of prompt payment.

In equity, as at law, the intentions of parties should prevail in such cases and when the *time* of performance, appears to be a distinct or essential feature in the contract, it should be enforced.

A bill for specific performance should be dismissed, if complainant does not aver performance, or an offer to perform his part, of the contract.

In Equity. *Appeal from Des Moines District Court.*

Opinion by Greene, J. Bill for specific performance filed in the district court of Henry County by Joseph Ferguson against John Vanloon. Previous to trial, the death of Ferguson was suggested, and Garretson as administrator substituted. Venue changed to Des Moines County.

The bill alleges that on the fifth day of April, 1841, Vanloon sold to Ferguson the east half of south-east quarter of section twenty-seven in township seventy, north of range six west containing eighty acres; and executed a title bond conditioned in substance that if Ferguson should pay his promissory note given for the purchase money, amounting to one hundred and twenty-six dollars and fifty cents, on or before the fifth of October, 1841, thereupon Vanloon should execute to him a good and sufficient warranty deed for the land. The bill also states that complainant made valuable improvements upon the land; that defendant extended the time of payment specified in the bond until April 4, 1842; that the true consideration was one hundred and six dollars instead of one hundred and twenty-six dollars and fifty

cents as mentioned in the bond: the surplus twenty dollars being intended as penalty: that October 28, 1841, he turned out a horse to Vanloon worth fifty dollars or more, the price of which was to be credited on the bond, and avers a readiness to pay the balance of the purchase money. The bill appears to have been filed May 12, 1842. The allegations therein are not supported by affidavit.

The answer of Vanloon denies the allegation in the bill, that the true consideration was to be one hundred and six dollars, instead of one hundred and twenty-six dollars and fifty cents, and alleges that there was no other contract than that set forth in the bond: that the said sum of one hundred and twenty-six dollars and fifty cents was the price agreed to be paid by said Ferguson, and that by mutual agreement, time was made material in said contract; that on the said fifth day of October, 1841, Ferguson utterly failed to pay any portion of said consideration money; but that October 28, 1841, he went to him and offered to waive all forfeiture resulting from his failure to pay at the time stipulated, and that he would then convey the land to Ferguson, if he would pay the amount agreed upon in the bond: but Ferguson professed an inability to pay at that time, and thereupon proposed conditions, to extend the time of payment until April 4, 1842, by indorsement on the bond, and then and there turned out a horse in part payment, with the understanding that the price should be twenty-five dollars, to be indorsed upon the bond, with the extension of payment: that the horse was sold to him at the low price of twenty-five dollars as an inducement to extend the time of payment without interest; that said Ferguson has wholly failed to pay any other portion of said consideration money, and denies that he ever tendered or professed a willingness to pay the amount due, and also denied that any improvement of value was made upon the land. The answer is properly sworn to, and no portion of it disproved by any exhibit or deposition. In this

condition, the cause was submitted to the court, and the bill dismissed.

The principal objection urged to this decision is founded upon the hypothesis, that time was not made a material part of the contract. This assumption is mainly derived from the rule, that courts of equity do not regard time as essential, in a contract, where circumstances of a reasonable nature, have prevented a party from strict compliance in that particular. But this rule is by no means universal. Time may be made material either by express agreement or by the peculiar nature and conditions of the contract. If to any substantial degree it becomes material to the rights and interest of the parties, or if expressly stipulated, time then becomes an important ingredient, and would now be generally regarded by courts as of the essence of the contract. *Lloyd* v. *Collett*, Bro. Ch. Cas.; 4 Ves. 686; 5 ib. 722, 818; 13 ib. 225; 2 Brock. 185; 14 Peters 173; 2 Edw. 78; 4 John Ch. 559; 7 Paige 22; 8 ib. 61; 3 Leigh 161. *Scott* v. *Field*, 7 Ohio, 443.

In this case it appears to have been uniformly the intention of the parties to make time an essential part of the contract. The bond explicitly requires Ferguson to pay his promissory note of one hundred and twenty-six dollars and fifty cents, by the fifth day of October, 1841, and if paid on or before that time, the said Vanloon shall thereupon make a good and sufficient warranty deed for the land. The subsequent conduct of the parties shows the interpretation they placed upon this language. It should be observed, that the bill is not supported either by affidavit or proof, and therefore the facts averred in the answer, and sworn to, are to be taken as conclusive upon all points responsive to the bill. It appears then, that Ferguson regarded the conditions of the bond as having been forfeited, and in order to obtain a renewal of them till April 4, 1842, he sold Vanloon a horse for less than his value. The application to have the bond renewed proves conclu-

sively that Ferguson regarded time as an important element in the contract. The time of payment in such contracts frequently has a controlling influence. A party is often induced to sell valuable property at a price considerably less than its real value, in order to obtain the money upon a particular day to meet some engagement, or secure some object of immediate importance, and which might be entirely frustrated if the payment should not be made as stipulated in the contract. A failure of payment at the time agreed upon, under many circumstances, would defeat the very object which induced the sale, and therefore the contracting party could not be placed in the situation, he would have occupied, if the contract had been performed. In such cases, the theory, that interest is a fair equivalent for non-payment at the agreed time, falls far short of the reality. The daily experience of business life proves that such disappointments cannot be compensated, by any established rule of interest. We think therefore, that reason and justice call loudly upon courts of equity, as well as courts of law to secure the intentions of parties, in such cases. When the time of performance appears to be a distinct or essential feature in the contract, it should be considered material, and be enforced.

But there are other reasons in this case which fully justified the court below in dismissing the bill. There is nothing to show that the complainant at any time performed his part of the contract, or placed himself in a position to demand a specific performance. The answer shows that Ferguson not only failed to pay the money on the fourth of April, 1842, but also that he never tendered nor offered to tender, the money after that time.

A court of equity will not grant a specific performance of a contract to a party until he has done his duty and having called upon the other party to perform, meets with a refusal. Had the money been tendered, it is probable that the deed would have been made, and the cost and trouble

of the suit avoided, or had the money been tendered and the deed refused, there would have been some ground for equity jurisprudence. As the party has not placed himself in a position for equitable interposition he must be left to his remedy at law.

The decree appealed from is therefore affirmed with costs.

Decree affirmed.

J. C. Hall and *C. Mason*, for appellant.

H. W. Starr, for appellee.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

OTTUMWA, JUNE TERM, A. D. 1851.

In the fifth year of the State.

PRESENT:

HON. JOSEPH WILLIAMS, CHIEF JUSTICE.
" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

SCOTT *v.* BABCOCK.

An assessment book, not admitted in evidence, in part proof of a tax title, without first showing the appointment of the equalizing officers. Greene, J. *contra.*

A tax sale, not legal unless all the requirements of the statute have been strictly performed

Nothing can be presumed in favor of the proceedings of officers, in order to sustain a tax title. Greene, J. *contra.*

A tax deed for delinquent taxes of 1843, not admissible in evidence, without proof of the assessment, collector's return, &c.

Under the revenue laws of 1844, lands are not subject to sale for taxes, until *three* years after the taxes have become due, and remain unpaid. *Abbe v. The State*, 1 G. Greene, 225, *contra.*

ERROR *to Van Buren District Court.*

Opinion by KINNEY, J. This is an action of right, brought by Babcock, to recover possessioon of lot six, in block one in the city of Farmington. Plea, general issue; jury trial, and verdict for plaintiff. A bill of exceptions was taken by the plaintiff, from which it appears that in order to establish his right to said lot, he introduced a patent from the United States to one Abel Gallard, which embraced the lot in controversy. The plaintiff showed a conveyance from Gallard to Bateman, from Bateman and wife to Thomas J. Babcock, from Babcock to Benjamin and wife, and from said Benjamin and wife to plaintiff, by deed bearing date April 17, 1845. He then proved the defendant in possession; and, having introduced testimony in relation to the rents and profits, rested.

The defendant then proceeded with his testimony, premising that he relied upon tax titles under two different sales and deeds. He first offered to introduce the assessment book for said county of Van Buren, for the year 1843; said lot six constitutes a part of said assessment roll. The defendant proposed to follow this up with the after acts of the revenue officers of the county, so as to make out a tax title to the lot, under a sale for the taxes due thereon, for the year 1843. To the introduction of which plaintiff objected, until it was shown that certain persons had been appointed in accordance with the requirements of the seventh section of an act to provide for assessing and collecting county and territorial revenue, approved February 13, 1843, to act in conjunction with the assessor in equalizing assessments, and that they filed their report. His objection the court sustained, and the appraisement roll was not received or permitted to be read, as the defendant did not propose to

accompany the assessment with proof of such appointment, to which the defendant excepted. The defendant then offered to introduce a collector's deed for said lot six, executed in accordance with a sale, made for the delinquent taxes due for the said year 1843, dated June 10, 1848, unaccompanied by proof of any preliminary steps of assessment, warrant or collector's return of delinquent list, to which plaintiff objected and the court sustained the objection.

The defendant then offered to introduce a treasurer's deed for said lot, dated June 27, 1847, from which it appeared that at the May term, 1847, of the district court, the state of Iowa recovered judgment against said lot, among others, for the taxes, interest and cost due the state, for the year 1844. Upon an order of sale, the said lot was, on the 27th of May, struck off and sold to the defendant. To the introduction of this deed the plaintiff objected, on the ground that it should be preceded by evidence of the assessment of taxes for that year, and of the warrant of the treasurer, and of the return of the delinquent list, and also on the ground that the deed was not *prima facie* evidence of the regularity of the proceedings. These objections were overruled. Plaintiff then objected to the deed for the reason that upon the face thereof, it appeared to be void in this, that the report of the treasurer of the delinquent list, and the judgment of the court and order of sale, were made before the time limited and provided by law. That no return, judgment and order of sale could legally take place until one year from the time mentioned in said deed; which objection the court sustained, and rejected the evidence offered by the defendant.

These rulings of the court are assigned for error. They present three questions for adjudication.

1. Was the testimony offered by the defendant unaccompanied by evidence showing the appointment of certain persons to act with the assessor in equalizing the assessment, and without evidence that they filed their report, properly rejected?

2. Was proof of the assessment, warrant and collector's return of the delinquent list, necessary to the introduction of the deed as evidence?

3. Was the second deed offered in evidence made for delinquent taxes due on said lot for the year 1844, void upon its face, and does it appear from the recitals therein contained, that the return, judgment and sale took place sooner than the time prescribed by the statute?

The statute by which it is claimed that the testimony under the first proposition was properly rejected, after providing for the election of township assessors, enacts "that immediately after the election and qualification of each assessor he shall commence assessing all the taxable property, subject to taxation, within his township or precinct, as the case may be, and shall deliver to the board of county commissioners, on or before the first Monday in July thereafter, a full and complete assessment roll, which roll shall set forth a precise description of land owned by each person therein named, which specification shall correspond with the plan or map of the original survey, and the number of acres specifically noted in a column by itself; and further, said lands and all town lots shall be valued at their true value in cash, with all the improvements thereon, by the present assessor, now elected in each county, with two other persons of good qualifications, to be appointed by the county commissioners of the proper county at their April term, one in each county commissioner's district other than that in which the assessor lives." "Such appraisers when so appointed, it should be their duty to attend with said assessor on the second Monday in June, at the county seat of said county, then and there to make said valuation as nearly equal as may be, which valuation when examined and corrected by the board of county commissioners, shall be recorded in the clerk's office of said board, and remain as a fixed value for five years." R. S., p. 548, § 7. The court held that under this statute it was necessary to show

the appointment of the equalizing officers, to act with the assessor, as a necessary link in the chain of proceedings and without proof of this, the testimony offered could not be introduced. The statute requiring the appointment of such officers is as imperative as any other provision, and as indispensable a pre-requisite as the assessment itself. It is an essential step in the progress of the proceedings, and proof that it had been observed was indispensable.

A sale of lands for delinquent taxes can only legally take place after all the requirements of the statute, from the first proceeding under it, up to the last, have been strictly performed. Nothing can be supplied by intendment. Those things which the statute requires to be done, must be done, or nothing passes by the sale. It is only upon *condition* of a compliance with the statute, that it authorizes a sale to be made, and hence if the *conditions* have not been complied with, the sale is unauthorized and void. The first evidence that the defendant proposed to introduce was for the purpose of establishing a tax title for the delinquent year 1843, and for this purpose the assessment book was offered with a proposition to follow it up with the subsequent acts of the officers.

The statute was approved thirteenth February, 1843, and took effect after passage, except that portion which related to the election of township assessors, which took effect on the first day of April, 1844. Hence the county assessors under the prior law were continued in office until the election of the township assessors. At the meeting of the board of county commissioners, at their April term *next* after the passage of the act, the two persons were to be appointed, who, with the assessor then in office,—to-wit: the county assessor—were to meet at the county seat, on the first Monday of June following, and then and there make the valuation, &c. This valuation when corrected was to be recorded and remain a fixed valuation for five years. This was to be done in 1843, before the township assessors came into

office, and therefore the lot in controversy was subject to said valuation, for the assessment of the tax for that year. The construction given this statute by counsel for plaintiff in error, that this valuation was not to apply for the year 1843, we think entirely unauthorized. By express language, the persons were to be appointed at the April term, 1843, and in June 1843, the valuation was to be made. It having been necessary then for the lot in question to have been valued by the appraisers appointed for the purpose in conjunction with the county assessor before the proper tax could be levied for the year 1843; it follows, as a necessary result, that unless so valued the levy of the tax would be illegal. It was consequently incumbent on the defendant in order to establish his title, to show that this provision of the statute had been complied with. The statute requires the appraisement when made and corrected, to be recorded. If it existed, it was within the power of the defendant to produce it. It constituted a necessary link in his chain of title, an essential pre-requisite to the validity of his deed. The ruling of the court excluding the testimony without this proof was correct.

It will be recollected that the court ruled the deed made for taxes due on the lot for said year, inadmissible, without proof of assessment, &c., as embraced in our second position. This decision we think was right. There is no provision in the statute of 1843, that such deed shall be *prima facie* evidence of the legality of the proceedings under which the sale was made. The plaintiff made out a perfect title to the lot, from the government of the United States, the common source of all title in this country, down to himself. The legality of this title the defendant does not controvert, but relies upon a county officer's deed to establish a junior title in himself. That deed depends for its vitality upon the legality of the proceedings of certain ministerial officers, and a strict observance by them, of the provisions of the statute. As nothing can be presumed in favor of the

proceedings of these officers, and as making the deed is but one necessary act among many others, to convey title, it is clear that it is incumbent upon the defendant to prove all the pre-requisite proceedings, in order to exhibit a valid title. It would not have been sufficient for the plaintiff to introduce his deed from Benjamin and wife without showing a connected chain of conveyances from the government down to him; and if it had appeared that any one of the conveyances was defective, his title would not have been perfect. It was just as necessary for the defendant, to trace his title to its original source, and to have established by testimony, that all of those acts which were necessary to authorize a sale and convey title, had been performed; and if any one had been omitted, an incurable defect in his title would at once be apparent. It is not the collector's deed that could divest Babcock of his title, and invest it in Scott; but if the title changed at all from one to the other, it was by virtue of a compliance with certain regulations of the statute relative to the public revenue. A compliance with these regulations, constituted the source and basis of the defendant's title and unless he could show *such compliance* his deed could be of no avail in defeating a title regularly derived from the United States.

The twenty-first section of the act, provides that if the taxes are not paid, the collector may proceed to collect the same by distress of goods and chattles. The twenty-second section, that if no goods and chattles are found, the collector shall give notice of the day and place of sale, &c. The twenty-third section, that the collector shall file with the clerk the verification of the printer, that the advertisement has been published, &c. The twenty-fourth section, that after he has filed evidence of publication as required by the preceding section, that he shall proceed in pursuance thereof to sell, &c. The twenty-fifth section, that when any lot or tract of land shall be sold, the collector shall give the purchaser a cercificate describing the piece of land with

certainty, and the time when such purchaser will be entitled to a deed, &c. It further provides that the collector or his successor in office, "at the time such deed is demanded, shall, at the expiration of two years, execute to said purchaser or his assigns, in the name of the territory of Iowa, a conveyance of the lot or tract of land so sold as *aforesaid*, and described in said certificate, which conveyance shall vest in the person to whom it is given, an absolute estate in fee simple," &c.

Grant that all of the other provisions of the statute had been adhered to up to the time when it becomes the duty of the collector to proceed to the collection of the taxes, he must then proceed to collect the same by distress and sale of the goods and chattels. If the delinquent has goods and chattels, out of which to make the tax, the officer cannot proceed against the land. His power to give notice of the time and place of the sale of the realty only arises when "no goods and chattles can be found, out of which to make the taxes." The fact that goods and chattels cannot be found, must alone lay the foundation for all subsequent proceedings, and if such is not the fact, every act performed by the officer to sell the land will be void. This is a condition precedent to any action of the officer towards exposing the land for sale, and on its observance his power to advertise and sell depends. *Gauntley's Lessee* v. *Ewing*, 3 How. 707. *Thatcher* v. *Powell*, 5 U. S. Cond. 28; *Stead* v. *Course*, 2 U. S. Cond. 151; *Barker* v. *Smith*, 4 Blackf. 70.

It will be observed that the statute "requires the sale to be made as *aforesaid*,—referring to the antecedent proceedings,—before the officer is authorized to make the deed. Such deed, when so made, is to vest in the purchaser an absolute estate in fee simple. In the case of *Kellogg* v. *McLaughlin*, 8 Ohio, upon a similar provision in the statute in relation to the transfer of the estate to the purchaser, the court remark "that a penalty so severe as this cannot with propriety attach, unless the officers of the government

—its agents—have strictly complid with and fulfilled their duty. The law must *have been strictly performed.*" In the case of *Atkins* v. *Kinman*, 20 Wend. 241, it was held that "when lands are to be taken under a statute authority, in derogation of the common law, every requisite of the statute, having the semblance of benefit to the owner, must be strictly complied with."

And in the case of *Beaty* v. *Knowler*, 4 Peters, 152, Mr. Justice M'Lean remarks, "that the power to impose a tax on real estate, and to sell it when there is a failure to pay the tax, is a high prerogative and should never be exercised when the right is doubtful." And in the case of *Tharp* v. *Spain*, 4 Hill, 81, Mr. Justice Bronson, in a very able and elaborate opinion, says: "Every statute authority in derogation of the common law to divest the title of one, and transfer it to another, must be strictly pursued or the title will not pass. This is a mere naked *power* in the corporation, and its due execution is not to be made out by intendment; it must be proved. It is not a case for presuming that public officers have done their duty, but what they have in fact done, must be shown. The recitals in the conveyance are not evidence against the owners of the property, but the fact recited must be established by proof *aliunde.*

As the statute has not made the conveyance *prima facie* evidence of the regularity of the proceedings, the fact that they were regular must be proved, and the *onus* rests on the purchaser. He must show, step by step, that every thing has been done which the statute makes essential to the execution of the power. It matters not that it may be difficult for the purchaser to comply with such a rule. It is his business to collect and preserve all the facts and muniments upon which the validity of his title depends." The learned judge cites in support of this position, *Rex* v. *Croke*, Cowp. 26; *Williams* v. *Peyton*, 4 Wheat. 79; *Rokendorf* v. *Taylor*, 4 Pet. 349; *Jackson* v. *Shephard*, 7 Cowen, 88; *Atkins*

v. *Kinman*, 20 Wend. 241; *Thatcher* v. *Powell*, 6 Wheat. 118; *Jackson* v. *Esty*, 7 Wend. 148; *People* v. *Mayor*, 2 Hill 9. "These cases," Justice Bronson continues, "and those to which they refer, will be sufficient to justify all that has been said concerning the necessary requisites for making out a title, in the defendant." We will add the following to the list, as in point, on the same subject: *Wiley* v. *Beam*, 1 Gilm. 302; *Garrett* v. *Wiggins*, 1 Scam. 335; *Doe ex dem Hill* v. *Leonard*, 4 Scam. 140. In which cases it was expressly decided that the auditor's deed was not admissible in evidence without preliminary proof that the prerequisites of the statute had been complied with. In *Thompson* v. *Gothem*, 9 Ohio, 170, Judge Hitchcock says: "In order to sustain a title under a sale for taxes, it is not sufficient to produce the collector's deed. There must be evidence to show that the tax has been levied, that the steps required by law to authorize a sale had been taken, and that the person making the deed had authority to make it."

Mason v. *Roe*, 5 Blackf. 98, is a decision much in point on the first branch of this case. The defendant relied upon a title under a sale of the lot for taxes assessed for the year 1831. He failed to prove that the board doing county business had fixed the amount which should be collected on the value of town lots in that year, and the question was, whether proof of such an act of the board was essential to the defendant's title. The court say, "it was the duty of the board to determine the amount of tax to be collected on town lots for county purposes, and unless they did determine there was no legal tax on the lot to be collected, and the defendant failed to prove any legal claim to the lot." And in the case of *Williams* v. *The State*, 6 Blackf. 36, it was held that the statute of 1835, under which the proceedings were had, contained no provision, *affecting the general rule*, respecting the proof of tax titles. "That rule *is* that the claimant under such title must prove that all the requisites of the law have been complied with." The court further

hold, "that unless the steps which the law required to be taken, as well before as after the collector's return had been regularly pursued, the circuit court had no jurisdiction under the statute to divest the plaintiff in error of his property and vest it in the State. And in the case of *Parker* v. *Smith*, 4 Blackf. 70, it was held that under a statute which made the deed *prima facie* evidence, the defendant—who was resisting the tax title—might prove that notwithstanding the collector's deed, that from the time the precept came into the collector's hands up to the time of sale, that there was sufficient personal property on the premises out of which the taxes might have been made, and that the collector's deed under said statute furnished no evidence that the tax had been legally assessed, or that it had not been duly paid, or that the land was not exempt from taxes.

See also, *Ronkendorf* v. *Taylor*, 4 Peters, 349, a case involving the validity of a tax deed. The supreme court hold the following language: "The court recognize the correctness of the principle contended for, by the counsel for the plaintiff in error, that in an *ex parte* proceeding of this kind, under a special authority, great strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be shown to have been complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes to cover any radical defect in his proceedings; and the proof of regularity in the procedure devolves upon the person who claims under the collector's sale."

See also, *Mason* v. *Fearson*, 9 How. 284; *Carlisle* v. *Longworth*, 5 Ohio, 229; *Waldron* v. *Tuttle*. 3 N. H., 340; *City of Washington* v. *Pratt*, 8 Wheat. 681.

We consider it unnecessary to multiply authorities upon this subject. We should not have referred to so many as we have, were it not for the fact that for the first time in the history of our jurisprudence, we are called upon to decide on the validity of a deed made on the sale of property for

taxes. Nothing that we can add will give additional force to the highly respectable authorites to which we have referred. We will close this branch of the case by stating that the court did not err in excluding the deed offered, unaccompanied with proof of the previous proceedings of the revenue officers. This *onus* was upon the defendant, and before Babcock could become disseized of his title, it was incumbent upon the defendant to establish an exact compliance with all the essential requirements of the statute. Upon such compliance alone depended the power of the officer to sell, and proof that the statute had been strictly followed was essentially necessary to impart vitality to the defendant's deed.

The only remaining branch of the case is one which we approach with some diffidence, not because we have not entire confidence in the correctness of our decisions, but because an opinion has once been written on the question adverse to the views which a majority of the court entertain. The question embraced in our third and last proposition, involves a construction of an act entitled "an act for assessing and collecting public revenue," approved February 15, 1844.

The defendant also exhibited a deed, made, as he contended, in pursuance of a sale under this statute, which the court decided void upon its face, in consequence of it appearing that the report of the delinquent list to the court, the judgment and sale took place one year sooner than the time prescribed by the statute. The deed, the court decided to be *prima facie* evidence of the regularity of the proceedings. This decision was in favor of the plaintiff in error, and therefore if erroneous, he cannot assign error upon it, neither can the defendant object to it as the deed was declared void, and the judgment was in his favor. The legality of the decision, then, does not properly arise. We may be permitted to remark, however, that the statute in this particular is different from that of 1843. "Sales made

and deeds executed by treasurers under the statute of 1844 are to have the same force and effect, and be of the same legal validity, as sales upon executions in the district court, and deeds made by sheriffs upon such sales; section sixty-five. And such deeds made by sheriffs are to be considered as *prima facie* evidence of the existence of a judgment and execution, authorizing said officer to sell, and also of the regularity of said sale." Laws of 1844, p. 44, § 9.

But the point under consideration arises in reference to the proper construction to be given to sections 50, 52, 53 and 54. Section 50 provides "that the treasurer shall, so soon after the first day of January in each year, as possible, make out a complete list of the lands, and property upon which the taxes remain unpaid, which list he shall file in his office."

By this section it will be observed that the treasurer is not obliged to make out the delinquent list, until after the first day of January of each year. He must do it, however, as soon as possible after that time. It may be that one month, three months, or even six months would elapse before it would be possible for him to make out the list of property on which taxes were unpaid; and yet if this were a fact, no statute would be violated by making it out after the expiration of the last mentioned period. The legislature evidently contemplated that some time would elapse after the first day of January, before this duty would be performed. The list when made out must be filed. No time is prescribed when this is to be done, but grant that it is to be filed as soon as made out, it cannot be filed on the first day of January. It is impossible for the filing to be made on the first day of January of the year in which the list is made out. The statute is, that the treasurer so soon *after* the first day of January in each year as possible, shall make out the list, &c. The first day of January must pass before the officer is permitted to proceed to discharge this duty. If he makes out the list *on* the first day of January,

he does it in violation of the positive provision of the statute. He could, with the same propriety, make it out before the first day of January, as on that day. There is no ambiguity we think in this section. It is only susceptible of one construction, or rather its provisions are too plain to require any construction. The fifty-first section provides for the compensation of the treasurer. The fifty-second section is as follows: "All taxes upon any lands and property due and unpaid on the first day of January, for the previous year, and returned delinquent as aforesaid, shall draw interest at the rate of fifty per cent. for the first year they shall so remain unpaid, and one hundred per cent. for the second year."

This section fixes the rate of interest. It matters not whether this interest commences on the first day of January after the list is filed, and continues two years from that time, or whether it begins on the first day of January previous to the treasurer's making it out, and remains on file the last year without interest. It is, however, but reasonable to presume that the legislature intended that the two years mentioned for the taxes to draw interest, were the incidental two years, during which the treasurer should receive the taxes. This would give the owner the right to pay his taxes, without interest, any time after the first day of January of the year in which the treasurer is required to make out his report. In no other way can we reconcile the difference between the first and second year's interest. In no other way can we account satisfactorily for the exorbitant interest required on the last year. In all of the preceding revenue acts, fifty per cent. interest was the highest rate authorized. Time, as we have remarked, was allowed the treasurer for making out his list. For the interest which might have been claimed for this fraction of a year, the legislature provided an equivalent by requiring a high rate for the second year. Although speculative and doubtful views may be entertained of this section, when taken by

itself, its meaning is obvious when viewed in connection with the context.

The succeeding section provides that "the treasurer shall receive the taxes due upon any of the delinquent lists, upon the terms provided for in the foregoing section, and upon no other, during the space of two years from the first day of January next, after said list shall be filed in his office as aforesaid."

The delinquent list, as we have shown, could only be filed after the first day of January. The taxes are to draw interest two years; and then this section immediately follows, requiring the treasurer to receive the taxes within two years from the *first day of January, next* after the filing of said list. But this must be done upon terms, as provided in the antecedent section, to-wit: the payment of interest at the rates therein stipulated. In this section there is no uncertainty, neither is it inconsistent with the preceding one. It qualifies and explains it. The treasurer, in clear and unequivocal terms, is required to receive the taxes due upon the delinquent list, any time within the space of two years after the first day of January *next* after it is filed. This is the only section definitive of the time when this may be done, and in this particular must control. The positive provisions of a section of the statute, cannot be disregarded, because of some seeming incongruity with other sections of the same statute. The *positive* section must prevail, and the others yield to, and be governed by it. When the provisions of a statute cannot be understood from the language in which they are expressed, we are then at liberty to look to the intention of the legislature, "the old law, the mischief and the remedy," and to give it such construction as the circumstances under which it was pased will justify; such an one as will harmonize all its provisions, and such an one as will carry out what we believe to have been the object of the legislature in passing it. But this rule of construction cannot be adopted when the statute speaks for

itself, and the intention of the legislature is apparent upon the face of the act. The construction contended for by the plaintiff in error, if permitted to prevail, would utterly annul this fifty-third section. This is the most important section in relation to this subject, being the only one prescribing the time in which the owner is permitted to redeem his land from the delinquent tax list. It is contended by counsel that the owner has but one year to pay his taxes from the first day of January next, after the report is filed, or in other words, that the computation of time commences on the first day of January, prior to the treasurer's entering upon the duty of making out his delinquent list. This construction is not authorized by either of the other sections of the statute, as each is silent in relation to the time the owner is allowed for paying his taxes. As we have remarked, such construction abrogates the fifty-third section, the only one in point as to the time allowed. But the fifty-fourth section is referred to as justifying such construction. "When the taxes upon lands in any county in this territory have remained thus due and unpaid, for the said term of two years, it shall be the duty of the county treasurer to make report thereof to the district court." "Have remained *thus* due and unpaid," that is due and unpaid as provided in the preceding section, to-wit: for two years next after the first day of January. This is clear from the context, "for the *said* term of two years," that is the said term of two years specified in the section preceding. This section is in perfect harmony with the fifty-third. It refers to it, and the term two years mentioned in it is expressly qualified by the words "thus" and "said," which refer to the section immediately preceding.

It is not necessary to dwell longer upon this statute. Neither do we consider it necessary to introduce authorities to show that such statutes are always to be construed more strongly against the government than the citizen. Our construction does not require any such foreign aid for support.

The statute is plain and easily understood, and the only wonder is that the profession should entertain conflicting views concering it. The case of *Noble* v. *The State*, 1 G. Greene, 325, has been referred to by the counsel for plaintiff in error. Since that decision was made the bench has changed. Judge Williams now occupying the place then filled by Judge Hastings. Although I assisted in trying that case, I dissented from the decision at the time it was pronounced. Subsequent examination and reflection have confirmed the views which I then entertained.

But it is said that the court has rendered judgment against the delinquents and that this judgment cures all defects in the preliminary proceedings. This question was not raised in the case of *Noble* v. *State* but it has been so frequently decided by this court, that an extended examination is not at all necessary. The deed offered in evidence by the plaintiff in error, and on which he relied, showed on its face that the court had no authority to render the judgment which it did render. It showed that the report of the court by the treasurer was made one year too soon; the judgment, consequently, upon it was rendered without the court having rightfully acquired jurisdiction either over the parties or the subject matter. *Williams* v. *The State*, 6 Blackf. 36. Jurisdiction will always be presumed when the court rendering judgment is one of general jurisdiction; and that the court had jurisdiction need not appear upon the face of the proceedings. But if it appears by the judgment relied upon or the proceedings sought to be enforced under it, that there was no jurisdiction in the court to render the judgment, such judgment and proceeding are void, and cannot be enforced, nor can any rights accrue under them. The droctrine is plainly laid down, and this distinction clearly made in the opinions delivered in the case of *Wright* v. *Marsh*, *Lee* and *Delevan:* 2 G. Greene, 94; and *Reid* v. *Wright*, ib. 15. See also a recent opinion of the supreme court of the United States in *Webster* v. *Reid*.

The judgment is absolutely void upon its face, for want of power in the court to render judgment at the time it was rendered, and was therefore liable to be impeached collaterally whenever attempted to be enforced. Suppose the judgment had been rendered in an action of assumpsit, and it had appeared that the defendant had not been served with process. In such case the supreme court of the United States, in *Webster* v. *Reid* say, "that when a judgment is brought collaterally before the court as evidence it may be shown to be void upon its face, by want of notice to the person against whom the judgment was entered, or for fraud." Or suppose from such a judgment it should appear that the defendant had only one day's notice, when the statute required ten, and there should be no appearance; who does not know that that would not be notice, and that the court would not acquire jurisdiction over the person? Or again suppose that the statute required one term to intervene after the issuing of the summons before judgment could be rendered, and it should appear from the judgment that it was rendered without such term intervening, would not such judgment be void and liable to be collaterally assailed when introduced for the purpose of establishing rights under it? How much stronger is the case before us when it appears that the treasurer had no power to make report to the court when he did make it, and the court had no power under the statute to render the judgment until after the expiration of one year from the time when it was rendered. This question of jurisdiction has been before us so frequently, and has been so ably presented, and so fully decided, that it would be but a work of repetition to pursue it further. The deed was void upon its face as ruled by the court below.

The facts that the various questions growing out of tax sales are presented to us for the first time, must be our apology for this extended opinion. We have endeavored to meet all these questions fully and fairly, and to settle

them in such a manner that the views which we entertain of the law applicable to tax sales cannot be misunderstood.

Judgment affirmed.

Dissenting opinion by GREENE, J. I cheerfully accord to the opinion, much ability and many correct legal propositions. But at the same time, I claim that the zeal of my brothers against tax titles, has taken them too far.

1. I assume that the first two questions for adjudication as proposed in the opinion, are not sustained by the record in the case. Had the assessment book been offered unaccompanied by other evidence, it might have been very properly rejected or pronounced insufficient to establish a tax title. But the facts in the case show, that the assessment book was offered with the proposition to follow it up with the other necessary proofs of title. The opinion admits that "the defendant proposed to follow this up with the after acts of revenue officers of the county so as to make out a tax title to the lot." Under such a proposition, how could the court with propriety reject the assessment roll? This was the first link in the chain of defendant's evidence, the very foundation upon which the superstructure of his title rested.

The assessment of the property was the first step that could be legally taken to bring the property under the revenue laws, and the assessment roll was the legitimate proof of the assessment. What item of evidence then, could, more appropriately come first in order, or what seperate item, could be more conclusive to sustain a link in defendant's title?

The opinion claims the appointment of appraisers, to be "as indispensable a prerequisite as the assessment itself." The appraisement was no doubt essential, under the law, but obviously the assessment was previously required; it was altogether prerequisite to the appointment and action of the appraisers. As the assessment was the precedent act, to

which all others referred, and to which they were subsequent, it follows as a necessary corollary, that evidence of the assessment came first in the order of proof, as the foundation upon which all the rest was supported. That the assessment roll was admissible to show the validity of the assessment, appears to my mind a self-evident proposition, against which no authority or reason can be adduced; especially under defendant's accompanying offer "to follow this up with the after acts," to make out his tax title. Would not those "after acts" comprise the "indispensable appraisement?" Clearly so.

As the assessment was both anterior to and independent of the equalizing appraisement it follows that the proof of the one, would be entirely different and apart from the other, and therefore it was not necessary that the evidence of the two distinct facts should be blended, and amalgamated before the court and jury. Would it not harmonize quite as well with a systematic practice and rules of evidence, to admit the proof of each act, in its appropriate order? Had the defendant rested his case, without proof of any one essential item in his title, if he neglected to show that the requirements of the revenue law had been substantially complied with before the tax deed was issued,—under a law which did not render the deed *prima facie* evidence of title,—then, his muniments of title might with some show of propriety have been rejected. But, as it is, the action of the court appears to my mind altogether premature and unauthorized.

2. The rejection of the tax deed, connected with the delinquent tax of 1843, because unaccompanied by proof of the preliminary steps, would have been well enough, if the defendant had not proposed to follow it up with the other necessary evidence. In rejecting the assessment roll the court kept out the other necessary proof. It seemed to be the settled determination of the court below, to admit no evidence whatever, that was offered for the purpose of estab-

lishing the "odious tax title." As the most essential links, the *alpha* and *omega* in defendant's title were rejected, he might well despair of offering minor and intermediate points. I am at a loss to know, how it would be possible, under such ruling to get any evidence of a tax title before a court. To justify this rejection of the deed, the opinion very correctly informs us that "such a deed depends for its vitality upon the legality of the proceedings of certain ministerial officers," &c. But should a court take it for granted that such proceedings are illegal by refusing to entertain them, sufficiently to test their legality? It is decided that the defendant should "establish by testimony, that all of those acts which were necessary to authorize a sale and to convey title had been performed," and still, the testimony which was offered to establish some of the most material of those acts, was rejected. How could those acts be established by testimony, when the court refused to entertain the only evidence by which the acts could be proved?

I am firmly of the opinion, that the defendant should have been permitted to proceed as he proposed, step by step, with his testimony, in order to show that every thing had been done which the statute makes essential to the execution of the deed. In this way only, could the court determine whether every substantial requisite of the law had been complied with.

If the defendant had proposed to rest his title upon the assessment roll, or upon the deed alone, if he had not distinctly announced his purpose to follow up with other testimony, "so as to make out a tax title to the lot," the ruling of the court, could with more propriety be affirmed.

It often happens that courts evince an unyielding bias against tax titles; so strong indeed as often to prevent the manifest intentions of the revenue laws. Such extremes, —though honestly executed—often result in great injustice and cast an unfortunate stigma upon the revenue laws of the land, by rendering them inoperative.

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True, in an *ex parte* proceeding of any kind against property, more than ordinary strictness should be observed. Before deciding that a man is divested of his title to land by tax proceedings, a court should be well satisfied that every substantial requirement of the law has been observed, and that there is no radical defect in the proceeding. But this strictness should not be carried to such extremes as to prevent the very first principles of the common law, which impart so much vitality, uniformity and harmony to our system of jurisprudence. If tax titles are so repulsive, let the appeal be made to the law makers; but let those fundamental rules in the law of evidence, and those first principles in the doctrine of presumptions, remain as established by the wisdom and experience of ages. In the opinion before us, such strict performance in every particular, whether essential or non-essential, is enjoined, and such a sweeping system of rejecting tax sustaining evidence is recognized, that it would be utterly impossible in any case to sustain tax deeds. Still the legislature intended that they should be sustained and that such "conveyance shall vest in the person to whom it is given, an absolute estate in fee simple."

It is the true province of a court to avoid either extreme, to see that the intentions of the law, are substantially subserved, and that the delinquent tax payer be required to conform to the revenue regulations of the state. It too often happens that an over generous concern for the delinquent tax payer causes the equally important interest of the public to be overlooked.

No revenue law can preserve vitality and force under the prevailing opinion that a tax title cannot be rendered valid. While it remains a law, let it be manfully, fearlessly enforced; if odious and oppressive, let it be repealed. In this way only, can our tribunals of justice retain that majesty of law and order, so essential to our free institutions.

3. The majority of the court have seen fit in this case

to overrule the decision in *Noble* v. *The State*, 1 G. Greene, 325. I regret especially that so little weight should be attached to a former decision of this court. At the time of that decison, I did not understand Judge Kinney as dissenting. Had I known it, I certainly should have placed him right in the report of the case. Until the case at bar came up I have always regarded *Noble* v. *The State*, as decided by a unanimous opinion. It is at least the opinion of a majority of the court, and therefore a decision of the supreme court, entitled to some consideration, and should only be overruled, for strong and obvious reasons, upon principles of general application.

The overruled point involves only a question of construction; and it must be conceded, I think, that strong arguments can be given in favor of the construction in *Noble* v. *The State;* much stronger than those advanced in favor of the present construction. Although the reasons are but briefly expressed in the overruled opinion, I do not consider it necessary to repeat them here.

But admit the full force of the construction given in this case to section fifty-three; admit that the treasurer was authorized to receive the taxes on the delinquent list of 1844, up to the first of January, 1848, does it necessarily follow that the provisions of section fifty-four could not be enforced in accordance with the very letter of that section? It provides "that when the taxes upon lands in any county have remained thus due and unpaid for the said term of two years, it shall be the duty of the county treasurer to make report thereof to the district court," &c. In this case the taxes had been due and unpaid over two years before the report was made to the court, and subsequent to that time the sale took place, and the deed was executed over two years and a half after the taxes became delinquent, or "*thus* due and unpaid for the said term of two years" as stated and limited by sections fifty-two and fifty-four, Now, take these two sections together with the obvious reference which

§ 54 makes to § 52, and it necessarily follows, that the treasurer was justified in making his report preparatory for judgment and sale at the first term of court after the taxes had been two years delinquent. It follows too, that the sale and deed in this case were not prematurely made. But according to the construction given in this case to § 53, the effect of them might have been avoided if the delinquent tax had been paid at any time before January 1, 1848. If paid within the time extended by the opinion, the fact could have been shown to the court, and the deed rejected. But it is not pretended that the tax was paid, within the period of the most extended construction, and consequently the deed should have been entertained as *prima facie* evidence of defendant's title.

Under the overruling construction, the act is rendered nugatory for one year after the delinquency. The tax payer is encouraged to a third years delay, without paying any interest or penalty. Can this be regarded as the spirit and policy of the law? In nearly every section of the act, with the single exception of section fifty-three, the legislative intention that the taxes should remain delinquent only two years, is to my mind obviously expressed, and as this was the construction of the supreme court at the time the court below rejected the deed, it follows that the court was in error under the authorities then in force. It is to be regretted that the opinion in this case is calculated to encourage a disregard of supreme court decisions. If this court depart so readily from their own decision, upon mere points of doubtful construction, how can it be expected that their decisions will command more respect from other courts.

Certainty and uniformity are of paramount importance, in judicial decisions; especially so in cases affecting the title to real estate.

For over two years, *Noble* v. *The State*, has been the settled law, upon which our citizens reposed with confidence, in their real estate transactions, but now, without regard to

that authority, or the rights which have been vested under it, and upon an unimportant question that has no bearing upon any other statute, or proceeding at law, we have that authority reversed and all rights acquired under it treated as nullities. Another change in the bench may result in another change in the construction of this statute. Well may men cry out against the uncertainties of the law!

But for this departure upon so slight a ground from former adjudication, I could perhaps have yielded my other objections in silence to the greater wisdom and experience of my seniors.

Wright and *Knapp*, for plaintiff in error.

A. Hall, for defendant.

HARROW *et. al. v.* LYON.

An order of the district court, dissolving a writ of attachment, vacates the attachment lien. Such lien is also vacated by a judgment against the plaintiff on demurrer, if rendered absolute by his failure to amend, or to except to the ruling of the court, on points of error for the supreme court.

Where a judgment appears of record to be final against the attaching plaintiff, the attachment lien not revived as against third parties, if the judgment is subsequently reversed.

ERROR *to Wapello District Court.*

Opinion by GREENE, J. An action of right commenced by A. M. Lyon against M. and C. F. Harrow to recover the south-east one-fourth of the north-west one-fourth of section seventy-two north of range fourteen west.

We learn from the record in the case, that E. Cole purchased the land in question of the United States, by virtue of a pre-emption right, on the first day of March, 1845. On the fifth day of the same month Herman P. Graves, agent of Seth Richards and C. W. Cowles, doing business under the name of Seth Richards & Co., sued out a writ of attachment, which was made returnable on the *third* day of the next term of the district court. The writ was issued against said Cole and served by attaching the land in dispute.

On the tenth day of the same month, Cole conveyed the land by warrantee deed to Francis M. Harrow, one of the plaintiffs in error. This deed was duly filed for record March 11, 1845.

At the April term, 1845, of the Wapello district court, Cole filed a demurrer to the declaration in the attachment suit. The demurrer was sustained and plaintiffs obtained leave to amend their declaration within sixty days. At the same time Cole moved to dissolve the writ of attachment. The motion was sustained and the attachment accordingly dissolved.

At the next term of the district court, Cole confessed judgment in favor of Herman P. Graves. Upon this judgment, a general execution was issued in favor of said Graves, against Cole. The execution was levied upon the land in dispute, and it was sold at the sheriff's sale, to A. M. Lyon, and the sheriff's deed was executed for the same, November 22, 1845.

Thus matters rested till 1847, when the case of *Graves* v. *Cole* was taken to the supreme court by writ of error, and at the June term, 1848, the judgment of the district court dissolving the writ of attachment was reversed. 1 G. Greene, 405; 2 ib. 467.

The foregoing facts were established beyond dispute by the records, &c., adduced upon the trial of this cause. Upon these facts the court instructed the jury that the proof introduced by plaintiff was sufficient to show a title in him, upon

which he was entitled to recover. This ruling of the court is now objected to, and involves but one question which we deem worthy of consideration.

Did the attachment lien, which was made March 5, 1845, in the case of Herman P. Graves agent of Seth Richards & Co., and *W. Cowles* v. *Ephraim Cole*, attach to the judgment and execution sale in the case of *Herman P. Graves* v. *Ephraim Cole*, and thus secure to Lyon's sheriff deed, executed November 22, 1845, a priority over Harrow's deed from Cole, which was recorded March 11, 1845?

If the attachment had never been dissolved, and if the record showed clearly that the judgment was rendered in favor of the plaintiffs in the attachment suit, we could at once answer this question in the affirmative. But as it is, there are two reasons why a negative answer must be given.

1. The order of the district court dissolving the writ of attachment, vacated the attachment lien. This principal was decided by this court in *Brown* v. *Harris*, 2 G. Greene, 505. In that case, it was held that an attachment is vacated by a judgment of non-suit; and that where a non-suit is set aside, and a new trial granted, the attachment lien vacated by the non-suit, is not revived. That decision we think clearly settles the case at bar.

From the moment the attachment was dissolved, the lien created by it was necessarily vacated, and the property released from the custody of the law. The order to dissolve was made by competent authority; it was unconditional; it placed upon record the fact that the land was released from the attachment incumbrance, and it remained as a final decision of the court, without any effort to change or disturb it, from April, 1845, till the writ of error was sued out in 1847.

2. The lien was not only discharged by the unconditional dissolution of the attachment; but it was also conditionally removed by the judgment which was rendered

against the plaintiffs on demurrer. Plaintiffs obtained leave to amend their declaration within sixty days. If they neglect to amend within that time, the judgment would be final against them; the condition upon quashing the attachment would be removed and the lien discharged. The record does not show that any amendment was made or amended declaration filed. Hence, upon that point also the lien might be regarded as dismissed. In *Suydam* v. *Huggeford*, 23 Pick. 465, a judgment was entered in favor of the defendant on a feigned demurrer and it was held that such a judgment dissolved the attachment.

Over three years had elapsed before the judgment dissolving the attachment in the present case was reversed. During that period, there was nothing of record to show that this attachment proceeding could in any way operate as a lien upon the land in question. Appearing free from incumbrance, the land may have passed from one innocent purchaser to another, who, in the assurance of a perfect title, may have made costly improvements upon the property. If by reversing such a judgment the attachment lien should be revived and made to operate *ab initio*, it would often result in gross injustice and irreparable injury to third parties. To avod such results, the right of attaching creditors should be governed by strict law, and if a creditor loses a priority of lien, either by negligence or want of regularity, he must abide the consequences, of his want of legal delinquency.

If in the attachmeut suit, the plaintiffs had at once taken exceptions to the decision, and had promptly taken it by writ of error to the supreme court, it might have been regarded as a suspension of the final decision upon the dissolution of the attachment, or as a continuance of that decision for the action of the supreme court. Such vigilance appearing of record, would be notice to all, that the decision was not to be considered final and might therefore without prejudice to third parties be adjudged as a continuance of the lien.

Governed as we should be in such cases by strict rules of law, there is another serious objection to the decision below in this case. It appears that the sheriff's sale, at which Lyon purchased, was authorized by a judgment confessed in the case of *H. P. Graves* v. *E. Cole* several months after Cole regularly deeded the land to Harrow. Now, the attachment was sued out in a case with other and different plaintiffs, viz: H. P. Graves agent for Seth Richards & Co. v. Cole. If there are two different suits as might be inferred from the record, it is obvious that the latter could not be benefitted by the attachment in the former suit.

On the whole, we are clearly of the opinion that the lien in the attachment suit was lost, by the decision dissolving the writ, that it was not revived against third person by the reverse decision in the supreme court, and consequently, that Harrow's deed from Cole has priority over Lyons' sheriff deed.

Judgment reversed.

H. B. Hendershott, for plaintiffs in error.

Geo. C. Wright and *W. H. Bennifield*, for defendant.

McCausland *et. al. v.* Cresap *et. al.*

If by direction of defendants, the plaintiffs were prevented from performing a contract of work, they could recover for the work done in proportion to the stipulated price of the whole job.

Where a mill was to be built, like a certain mill described in the contract, it was held that if the defendants directed or assented to a departure from the model mill, they would not be entitled to a set off against plaintiff's demand, for such departure.

McCausland v. Cresap.

If, in the plan of a mill, the defendants directed or assented to alterations, which delayed the completion beyond the stipulated time, the defendants would not be entitled to damages for such delay.

If the charge to a jury is not sufficiently pointed or explicit, the attorney should request and point out more direct instructions.

Instructions, substantially correct, and not calculated to mislead the jury, not erroneous.

A party not legally liable for the consequences of merely gratuitous advice given by him.

ERROR *to Lee District Court.*

Opinion by WILLIAMS, C. J. The plaintiffs brought their action of assumpsit against the defendants to the September term, 1850, and filed therewith a petition for a mechanic's lien, under the statute, and claimed the sum of three hundred dollars as due to them on a contract to build a steam saw mill, in the construction of which they had been employed, and had labored for the defendants. The petition filed by the plaintiffs set forth the contract, and the place where the mill was to be erected. Defendants were to furnish all the materials. The timber was to be furnished, and "delivered hewn or sawed ready to be framed or worked into the building and machinery: for which work and labor in erecting the mill, the defendants promised to pay the plaintiffs the sum of three hundred dollars, when the work was completed." Plaintiffs aver that they completed the work according to the terms of the contract, and that defendants promised to pay them the sum of three hundred dollars therefor. That though requested to pay, the defendants refused to do so, &c. The plaintiffs also aver that other and additional work was done by them, besides that required by the contract, at the instance and request of the defendants, which has not been paid for, and a refusal to pay the same. That the land, upon which, by the contract the mill was by them erected, is owned by the defendants. The damages are laid at the sum of four hundred and ten dollars. An averment is also made, that the money due to them for the work became payable within one year last past, and

before filing the petition. They concluded with a prayer that the court would render judgment against the defendants in their favor for the damages, and that the same may be adjudged a lien on the mill and land, as provided by statute.

The defendants appeared and filed their plea of non-assumpsit, and with it, under the statute, gave notice, that as a part of the contract between them, it was agreed that plaintiffs were "to erect and build a steam saw mill for the defendants, like the steam saw mill of one William Funk, situated upon the Desmoines river near Keosauqua, and make such mill do and perform as good business as the said mill of said Funk." That they had failed to do so, and also failed in other particulars. That they had done the work in such a manner, that it was not in accordance with the contract, and so badly that the mill was worthless and of no value to defendants. Notice is also filed of set-off in damages, money paid, money due, &c. The notice concludes by a judgment for so much of the set-off as will balance the plaintiff's demand, and for the overplus if any. This notice is accompanied by a bill of items of the matters of set-off. The cause was tried, and verdict rendered by the jury for the plaintiffs for fifty dollars damages and judgment thereon. The court also decreed a mechanic's lien in favor of the plaintiffs, for the amount of the judgment on the mill and land of the defendants, as prayed for in the petition.

The plaintiffs in error insist on the following as error in the instructions of the court below:

1. The court erred in instructing the jury that the plaintiff's claimed that if the work was wrong and needed to be altered, the fault belonged to the defendants, or at least to the plaintiffs and defendants jointly; so that the loss if any, must be where it falls; and so is the law if such is the fact.

2. The court erred in the instruction that if the defendants do not claim damages for the abandonment of the job,

but only for its being improperly done, then, they must pay such proportion of the whole price, as the part done, bears to the whole job, deducting the necessary expense of alteration, and reduction in value, &c., without giving any damages for the delay.

3. The court erred in only instructing the jury, that if defendants claimed for damages for abandoning the job, defendants would only be entitled to deduct for the expenses of alteration, and what it would cost to finish the job, and in said instruction the court gave defendants nothing for damages for delay.

4. The court erred in instructing the jury that if defendants knew that plaintiffs were deviating from the model and permitted them to go on, the defendants must take the consequences.

5. The court erred in instructing the jury as they did, as to the foundation for the mill, and gratuitous advice as to foundation, given while plaintiffs were doing the job.

The first assignment of error relates to an alleged alteration of the work, as done, by the plaintiffs, upon a discovery that it had not been done in a right manner. The case as of record shows that the defendants, as set-off to the plaintiff's demand, claimed, that the work had been improperly done, so that he was under the necessity of having it altered at his own expense. This allegation was answered by the plaintiffs, by alleging that this additional trouble and expense was not occasioned by their default, but by that of the defendants themselves. Upon this point, the court charged the jury, as follows: "The defendants claim that the plaintiffs undertook to construct the mill on the same plan, with the same arrangement of machinery, and to operate in the same way as a certain other mill which was agreed upon as a model, and that having partly performed the job, it was found they had departed from the model mill, and so arranged the work that it could not be put into operation without expensive alterations, and that they thereupon

advanced it voluntarily, and the defendants made the necessary alterations and completed the job on the original plan as nearly as it would admit of, at their own expense. And they claim to deduct from the proportionate part of the price, the necessary expense of making the alterations, and the reduction in the value of the mill, occasioned by faults that could not be so remedied; and they claim that the payments they have already made, and the deductions to which they are entitled, are together, more than the proportionate share of the price to which the plaintiffs would otherwise have been entitled. If you shall find the facts to be so, and that there is nothing else in the case to change the rights of the parties, your verdict should be for the defendants. But the plaintiffs claim that the arrangements of the model mill were departed from, by the direction or at least with the assent of the defendants, and if the work was wrong and needed to be altered, the fault belonged to the defendants, or at least to the plaintiffs and defendants, jointly, and so the loss, if any, must be where it falls; and so is the law, if such are the facts."

It appears that the plaintiffs before the work was finished abandoned it, and left it; and that in order to render the mill available for any useful purpose, the defendants proceeded at their own expense to finish it. It also appears that there had been a departure, as to the plan of construction, from that of the mill which had been taken and agreed on as the model for the work. The liability for the loss and expense occasioned by this departure, was charged by the parties, each on the other; and the proposition also was presented that the responsibility of it was chargeable to the parties mutually. It also appears that it was alleged, and urged that the work was abandoned before it was completed, at the instance of the defendants, who prevented the plaintiffs from proceeding with the work to completion. This being the state of the case before the jury, we find no error in the instruction on the questions here presented.

The substance of the charge of the court is, that if the plaintiffs were prevented from proceeding with the work, by the act of the defendants, that then they would be entitled to recover for the work and labor done in proportion to the stipulated price of the whole job, deducting any payments made. But, that if the plaintiffs abandoned the job, voluntarily, after the alteration in the plan had been made, and by reason of that abandonment, and alteration, the defendants were put to expense and trouble in returning as nearly as possible, to the original plan, agreed on, and also suffered thereby, in a depreciation of the value of the mill, and that, if the expenditure and loss thus occasioned would amount to more than the proportionate share of the price to which plaintiffs would otherwise be entitled, then in the absence of any other matter which would affect the rights of the parties, the verdict should be for the defendants.

Having said this much, the court proceeded to state the allegation of the plaintiffs in answer to a part of the defence set up to his action, to-wit: "That if the model had been departed from, by the direction of the defendants, or at least with their assent, and therefore the work was wrong and alteration necessary, that fault belonged to the defendants, or at least to the plaintiffs and defendants jointly." In response to this proposition, he then says: "And so the loss if any, must be where it falls; and so is the law if such are the facts." This we understand to affirm, as law, that if the defendants, directed the departure from the model, or assented to it, or if it were done by consent of both the plaintiffs and defendants, then they—the defendants—could claim nothing on that account, certainly if the defendants directed the alteration to be made, or assented to it, or formally agreed with the plaintiffs to make it, they would not be allowed to set up as set-off to the plaintiff's demand, the expense of, and the injury occasioned by that alteration.

The second assignment of error is based upon the fact that the court in giving to the jury the legal principles, as

to the recovery of the plaintiffs in the case as presented, did not instruct them to allow damages to the defendants for the delay in finishing the mill, caused by the alteration in the plan of building it. This assignment we also think is not well made. After charging as set forth in the assignment, the court, having stated that "if defendants claimed nothing for the abandonment of the job," proceeds and says: "and if the defendants caused or assented to the misarrangements of the work, they must pay the proper proportion without deduction, except for payments made." Here the court charges upon the hypothesis, that *if* the defendants caused, or assented to the alteration of the plan, by reason of which, the completion of the mill was delayed, then no allowance of damages for such delay should be made for them in defence of the action. This, we hold, is the proper construction of the charge. It is true that the court does not charge directly, and pointedly, on the question of the delay, but excludes it from the statement of the proposition presented, by saying that if the delay was caused by the act of the defendants, they could not be allowed damages for it. If the charge were not sufficiently direct on this, or any other point involved in the case, it was in the power of the defendant's attorney to request of the court, in writing, instruction in such a manner as to bring the matter directly to the mind of the court, and have it, on the law, presented to the jury, unless the instruction of the court below be in violation of the law; or unless the court, upon request duly made, by the party interested, or his attorney, in writing refuse to give proper instruction in the case, this court will not interfere when the instruction, as far as given, is substantially correct, or is not calculated to mislead the jury.

The third assignment of error is founded substantially upon the principle of the second which has just been disposed of. We will here only add, that if there be anything in the case on trial which may be deemed, by the party or his

counsel, of sufficient importance to require instruction from the court on it, as to the law, and which may not be considered and presented by the court in its general instructions to the jury, it is the privilege as well as the duty of such party or attorney to make special request in writing for such instruction, and thus bring the matter up to the mind of the court; otherwise it will be presumed by this court, that the court below has done its duty.

The fourth error assigned is not well taken. The instructions of the court on the subject of what is there termed the *misarrangement* or alteration of the work, taken together, is not predicated on the mere *knowledge* of the defendants that the plan was altered; but the judge in his charge puts it upon the *assent* of the defendants to the alteration, and charges "that if the defendants assented that plaintiffs might quit, or if they failed to furnish materials, and the plaintiffs quit for that cause, then that deductions would only be allowed for the misarrangement of the work, in case it was misarranged contrary to the contract, and without the assent of the defendants." The court then goes on to charge that if the defendants *directed* the alterations, or *knew* that they were deviating from the contract and suffered them to go on with the work they must suffer the consequences. These instructions are substantially correct. Objection was urged on the argument to the use of the word *assent* as in the instruction. We can see nothing substantial in this, as it is not improperly used nor were the jury likely to be misled by it. The burden of the charge of the court is, that if the defendants assented to the alteration of the plan originally agreed upon, directed it or knowing it, suffered it to be done, and then when the job was abandoned by plaintiffs they proceeded to appropriate and use the work as far as done, they could not be allowed any set-off for damages on account of the delay. We see nothing in this part of the instruction of the court to warrant a reversal of the judgment.

The fifth and last error assigned is as to the instruction of the court relative to the foundation of the mill.

A question appears to have been raised in the case as to which of the parties should bear the responsibility and suffer the consequences of misplacing the foundation of the mill, or chimney, by which it seems the alteration complained of became necessary. On this point the court instructed that if the building of the foundation was by the contract, made a part of the work which was to be done by the plaintiffs, or if they had adopted it as a part of the job, to be done by them on the contract, and it was mismanaged, and thereby damages accrued, then, they would be liable; but if they gave advice concerning it when it was not their business to build it, which advice was merely *gratuitous* they would not be liable, and could not be made to suffer the consequences. There is no error in this instruction. A mere gratuitous advice given by a person to another as to the management of his business, without consideration, and when the person giving it is under no legal obligation by contract, express or implied, relating to the subject matter of that advice, will not create a legal liability.

Having disposed of the several assignments of error in this case, we deem it proper to remark, that the charge of the court below is at great length. The propositions of law arising from the facts presented by the evidence are minutely noted and discussed under various statements of them, and in such a manner as to require a close examination of the whole charge, in order to understand and apply its conclusions of law. The assignments of error seem to have been made as to particular portions of the instructions on a point without including all given therein by the court. This has resulted in rendering the duties of this court more arduous, and this opinion more prolix than it otherwise would have been. As we find there is no substantial error in the instructions of the court below, and as nothing else

in the proceedings of the case is made the subject of complaint, the judgment of the court below is affirmed.

Judgment affirmed.

A. Hall and *Geo. G. Wright*, for plaintiffs in error.

H. M. Shelby, for defendants.

Hindman *v.* Mackall.

An issue on the plea of *nul tiel record*, is to the court and not to the jury; and upon a record which involves no question of jurisdiction or fraud, it is the only proper plea.

The same faith and credit to be given to the judicial proceedings of other states, as they have within the state whence they are taken.

Nil debit not appropriate to a judgment record which is not objected to for fraud or want of jurisdiction, but under such a plea want of jurisdiction and fraud may be shown.

Under the plea of *nil debit*, the defendant may show that the attorney had no power or authority to confess judgment against him, and while such a plea and proof are pending, it is error to render judgment on the plea of *nul tiel record*.

Error *to Van Buren District Court.*

Opinion by Kinney, J. This is an action of debt brought upon the record of a judgment rendered in the court of common pleas in the county of Beaver, a commonwealth of Pennsylvania. The declaration is in the usual form. The defendant below, Hindman, pleaded: 1. Statute of limitation. 2. Infancy. 3. *Nul Tiel Record.* 4. *Nil debit.* Accompanying the last plea was the following affidavit: "William Hindman being sworn, deposes and says that he never signed or authorized any body to sign his name, to

the bond on which judgment was taken against him, in the county of Beaver, in the State of Pennsylvania, as alleged in the plaintiff's declaration against him. And further says that he never knew of the existence of said bond, until he heard of it in this state, about four years since, and that at the date of said judgment he was but eighteen years of age." The plaintiff demurred to the plea of the statute of limitation, and filed a motion to strike the plea of infancy from the record. A demurrer was also filed to the plea of *Nil debit*, assigning for cause that the plea of *Nil debit*, to debt on judgment, was not allowable.

There appears to be but one record entry in relation to the demurrer to these pleas. By that, it seems that one demurrer was submitted to, and the plea was amended. It was conceded in the argument, that this was the demurrer to the plea of infancy, and the demurrer to the plea of *Nil debit* was undisposed of; and that as it was an improper plea, one which could not at all avail the defendant in his defense, that the defendant could not complain of the consequence of the courts having tried the cause, regardless of the defense set up by the plea; and that the plea of *Nul tiel record* is the only plea allowable in the actions of debt upon judgment. The cause was tried by the court upon the issue joined by the plea of *Nul tiel record*, and a judgment of $566 74 debt, and $280 56 for damages rendered against the defendant.

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The main question presented by the argument and record in this case is, did the court err in rendering judgment on the plea of *Nul tiel record* while the plea of *Nil debit*, verified by affidavit, remained on the file and undisposed of?

The issue made of *Nul tiel record* was only triable by the court. It could not be inquired into by the jury. The truth of this plea can only be tried by an inspection of the record by the court, and if the court find from an examination that the record offered in evidence, is the record declared on, they must find upon this issue for the plaintiff.

But while this is so, did not the court go too far in rendering judgment, with the plea of *Nil debit* on file, which, if a proper plea in this action, would entitle the defendant to a jury trial? The decision of this question depends, of course, upon whether the plea of *Nil debit* can be regarded as a good plea to an action of debt upon judgment, or whether as was contended in the argument, the plea of *Nul tiel record* is the only one that can be pleaded to this action. If so, we are not disposed to disturb the decision of the court below; but if not, and the plea in this case verified by affidavit, was permissable as a good defense to the action, then the court erred in rendering judgment with the plea on file, and undisposed of. The faith and credit, which by the act of congress, are due to the judgments of a sister state, rendered after jurisdiction appeared, exclude all defense to an action upon the record of a judgment in an other state, which the party could have made, at the time the judgment was obtained. But is it too late when the party has had no notice, and has not been personally served with process, to file the plea of *Nil debit?* The plea of *Nul tiel record*, when service has been obtained, and jurisdiction acquired, is the only proper plea. But while this is the case, the jurisdiction of the court rendering the judgment, may be inquired into, and the plea of *Nil debit* will allow the defendant to show that the court had no jurisdiction over his person. It is only where the jurisdiction of the court in another state, says Chancellor Kent, is not impeached, either as to the subject matter or the person, that the record of the judgment is entitled to full faith and credit; and if the suit in another state, was commenced by the attachment of property, the defendant may plead in bar, that no process was served on him, and that he never appeared either in person or by attorney. 1 Kent's Com., 2d Ed. pp 260-61; *Starbuck* v. *Murry*, 5 Wend. 148.

The case of *Holt* v. *Alloway*, 2 Blackf. 108, we refer to as being in point on the question here presented. It was an

action of debt, founded on the judgment of the circuit court of the state of Kentucky. The defendant pleaded *inter alia*, that the judgment, if any, had been obtained against him, on a recognizance of special bail for Alloway, without any notice having been served on the defendant, and without any capias *ad satisfaciendum*, having been issued against the principal. There was a general demurrer to the plea, a judgment for the defendant. In affirming the decision, Judge Blackford says: "By the act of congress of 1790, passed in pursuance of a provision of the constitution of the United States, the judicial proceedings of each state shall have the same faith and credit in the other states, that they have in the states whence they are taken." According to this act we consider that the judgment of a court of record of competent jurisdiction, in one state, fairly obtained, where the defendant had personal notice of the action is conclusive between the parties in any other state in which an action may be brought on it. In such a case *nil debit* cannot be pleaded, because that would lead to a re-examination of the merits of a cause, presumed to have been already fully and fairly tried. Then the record being conclusive *Nul tiel record* is the only general plea. *Mills* v. *Duryee*, 7 Cranch. 481. But if the court rendering the judgment, has no jurisdiction of the parties, or of the subject matter, or if the judgment be obtained by fraud, we are of the opinion that the judgment is not to be confined to the single plea of *Nul tiel record*, should an action be brought against him in another state on such judgment. In these cases he must be permitted to plead the fraud, or the want of jurisdiction of the person or the cause in bar of suit. The common principles of justice seem to demand that such should be the construction of the act of congress, and there is good authority for saying that such construction is in accordance with the principles of law. *Bissel* v. *Briggs*, 9 Mass. 462; *Bordon* v. *Fitch*, 15 John, 121; *Andrews* v. *Montgomery*, 19 John, 162.

The act of congress is based upon the principle that the merits of a cause once fairly tried and determined in one state should not be subject to the subsequent trial and decision of the courts of other states; but a judgment rendered in the absence of the defendant, and without any personal notice to him of the suit, cannot be said to be thus fairly obtained, and consequently does not come within the principle of the act of congress.

In this case it appears from the record which is attached to the declaration, that the judgment was rendered upon a bond, upon the confession of attorney, which fact expressly negatives all presumption of personal service. The defendant in the action upon the judgment, pleads *nil debit* and swears that he never signed or authorized any body to sign his name to the bond on which judgment was taken against him, and that he never knew of the existence of said bond, until he heard of it in this state, about four years since, &c. If this be true, and the demurrer admits it to be so, it is a good defense to the action, and the defendant in setting it up, is only defending against a judgment obtained by fraud, and possibly by a resort to forgery. Under the plea of *Nul tiel record* the defense would not be permitted, and if it cannot be made under the plea of *nil debit* then indeed is the defendant without remedy, and must become the subject of judicial oppression, by virtue of that faith and credit due to judgments emanating from other states, although there conceived and obtained by a resort to fraud of the basest character. We think it would be doing violence to the act of congress to give to it a construction which would exclude a defense of this kind. It may well be assumed from all the authorities on this subject that unless the court had jurisdiction of the party and subject matter, that the judgments do not come within the preview of the act of congress, and consequently cannot be protected by it. Such judgments are absolutely void, and are neither entitled to faith and credit at home nor abroad. In the case of *Shumway*

v. *Stillman*, 6 Wend., 447, the following doctrine is laid down. The case was instituted in New York, on a judgment obtained in Massachusetts. The defendant pleaded, that at the time of the commencement of the suit in which the judgment was obtained, and when the judgment was rendered, and during the intervening time, he was residing in New York; and that he was not an inhabitant of Massachusetts; that during all the said time he was not in Massachusetts, and was not amenable or subject to the jurisdiction of the court in which the judgment was rendered, was not arrested or personally served with process in the said suit in Massachusetts, and had not any legal notice of such suit. The plaintiff replied that the defendant had had notice of the suit, and had by an attorney appeared to the same. There was a verdict for the plaintiff, subject to the opinion of the court, as to the law. The court said that the plea was good; also that the judgment of a court of general jurisdiction in any State of the Union, is equally conclusive upon the parties in all the other states as in the state in which it was rendered; but that this is subject to two qualifications. 1. If it appear by the record, that the defendant was not served with the process, and did not appear in person, or by attorney, such judgment is void. 2. If it appear by the record, that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him.

In the case before us, the record shows that the defendant appeared by attorney. The plea denies the authority of the attorney to do so. According to the authority just quoted, the defendant had a right to disprove such authority on the part of the attorney. This the defendant ought to have been permitted to do, under his plea of *Nil debit*.

In Massachusetts, in the case of *Hale* v. *Williams*, reported in the note to *Holt* v. *Alloway*, 2 Blackford, the court says: "If it appeared by the record that the defendant had notice of the suit, or that he appeared in defense,

they are inclined to think that it could not be gainsayed, for as we are bound to give full faith and credit to the record, the facts stated in it must be true judicially, and if they should be untrue, by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered, for redress, for he could not be allowed to contradict the record of a plea, and by an issue to the county thereon. But if the record does not show any service of process or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it, for it is manifestly against first principles that a man should be condemned either criminally or civilly without an opportunity to be heard in his defense.

In the case of *Shurber* v. *Blackbourne*, 1 New Hamp., 242, where a plea of *Nil debit* was pleaded to an action upon a judgment of a sister state, the court say: The judicial proceedings or judgments contemplated by the act of 1790, were therefore not judgments rendered without notice to the defendant, or appearance to the action, but judgments which were recognized and enforced at common law, as foreign judgments. Judgments of the courts of record of one state, rendered without notice or apperance of the defendant, when sued in the courts of another state, are therefore not affected by the statute of 1790, but remain as at common law, mere nullities, unless within the jurisdiction where they were rendered. The court further say, that the record in the case affords no evidence that the defendant had personal notice of the suit, or appeared to the action in the court in which judgment was rendered, and these are facts which we are not to presume; they should appear upon the record. And the court decide *Nil debit* to be a good plea.

In the case under consideration there was no personal service on the defendant, Hindman. True, a person

representing himself as the attorney of the defendant, appeared and confessed judgment; but this authority Hindman denies under oath, which he had a right to do, according to the decision in *Shumway* v. *Stillman*. We think we have shown, by the authorities referred to, that the plea of *Nul tiel record*, is not the only plea allowable in an action on a judgment. As a general rule, this is the proper plea, but we have shown that exceptions which exist to this rule, and the case before us, clearly fall within the exceptions.

While the court were right in trying the issue upon the plea of *Nul tiel record*, yet they should not have rendered judgment upon the merits of the case on that issue, while another issue was pending, which could only have been tried by the jury, except by the defendant to submit it to the court.

There are other questions, such as variance between the declaration describing the judgment and the judgment offered in evidence, which it is unnecessary to discuss, as the judgment must be reversed on the question of pleading, to which the attention of the court has been principally directed by the argument.

Judgment reversed.

A. Hall and *H. M. Shelby*, for plaintiffs in error.

J. C. Hall and *C. H. Phelps*, for defendant.

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Gallinger *v.* Pomeroy, *Adm'r.*

An agreement to pay a certain portion of a promissory note when collected, amounts to an equitable transfer of that portion of the note, and such portion cannot be claimed as part of the assets of the insolvent payer.

In Equity. *Appeal from Wapello District Court.*

Opinion by Greene, J. Bill filed by Abram B. Gallinger against John Pomeroy, adm'r of the estate of David M. C. Lane. The facts stated in the bill show that Lane, on the 24th of February, 1849, executed a written instrument in these words: "On or before the first day of April next, I promise to pay Elam Rush fifty-five dollars for value received, to be paid out of a note I hold on W. H. Barnes when collected, sooner or later, using due diligence." On 27th of June following, Rush assigned this instrument to complainant. Before the Barnes note was collected Lane died insolvent; Pomeroy was thereupon appointed administrator of the estate, and soon after collected the note against Barnes, and refused to pay the fifty-five dollars to complainant, from the funds collected, but claimed the same as assets for the estate. Complainant thereupon filed his bill to enforce payment, agreeable to the tenor of said instrument, out of the funds realized from the Barnes note. A decree was rendered in favor of complainant for the amount of the instrument, but ordered payment from the assets of estate, thus placing it in the situation of other demands against the estate, to draw *pro rato* from the assets. To that portion of the decree complainant objects, and now seeks to reverse in this court.

We think the instrument executed by Lane clearly expresses the intentions of the parties, and that it was designed as an equitable transfer of fifty-five dollars of the funds which might be realized from the Barnes note. In

equity Lane assigned his interest to that portion of the note, and held the same in trust for Rush or his assignee; complainant, as assignee of Rush, acquired an equitable lien upon fifty-five dollars of the note and of the funds when collected. The funds paid on the note came into the hands of the administrator of Lane, clothed with the trust and subject to the equitable lien which had been created by the parties to the instrument in question. The administrator then had no right to consider the fifty-five dollars as general assets of the estate.

The authorities upon this point we regard as conclusive. Story, Ex. Jr., §§ 1043–44–45. In estate of Fenn, 1 Ashmeed, 319, it was held that when an intestate had given his creditor an order on his debtor, which was accepted, payable out of funds when they should come to hand, that it gave the creditor a specified lien on the fund out of which it was to be paid, and that it could not be considered as assets in the hands of administrator, on the death of the intestate. The same principle obtained in Minick's estate, 8 Wetts. and Lery, 402. In deciding the case at bar, the court below must have considered the instrument as possessing nothing more than the properties of a promissory note, with the usual liability against the maker. But we regard it as an assignment of fifty-five dollars of the Barnes note, and an undertaking to use due diligence in collecting and paying the same to Rush, and it clearly indicates that the credit was given upon the faith of that particular fund, rather than upon the individual responsibility of Lane.

The decree of the court below is therefore reversed, and a decree will be rendered in this court agreeable to the prayer of complainant's bill.

Decree reversed.

W. H. Brumfield and *W. A. Thompson*, for appellant.

Geo. G. Wright, for appellee.

Baldwin *v.* Winn.

On overruling defendant's demurrer, it is error to render judgment against him, without disposing of his plea on file.

Error *to Wapello District Court.*

Opinion by Williams, C. J. Suit by Jesse B. Winn against Nehemiah Baldwin in assumpsit on a due bill, tried at the February term of the district court for Wapello county, where the cause was called for trial. The defendant demurred to the plaintiff's declaration specially, and assigned several causes of demurrer, to such court thereof, &c.; also, filed his plea of the general issue. The court on hearing, overruled the demurrer, and therein entered final judgment against the defendant for the amount of the due bill and interest, with costs, without disposing of the plea of the general issue.

The plaintiff here assigns as error:

1st. The overruling of the demurrer to the plaintiff's declaration.

2d. The court erred in rendering final judgment in overruling the said demurrer, without regarding the plea filed.

3d. The court erred in rendering judgment for the plaintiff below.

There is manifest error in this proceeding; however, the plaintiff in error cannot be allowed here to complain of the ruling of the district court on the demurrer, with a view to a reversal of the judgment on that account. When his demurrer was overruled he should have stood upon it, and taken his exception to the ruling of the court. The record shows that the parties were in court by their attorneys, and that no exception was taken to the ruling of the court on the demurrer. This rule of practice is salutary and is inculcated generally. The record also shows that the defendant

filed his plea of the general issue, and he now seeks to reverse the judgment, for the reason that the judgment of the court was rendered without regarding this plea. This he does on the ground that he claimed, or was entitled to, a trial on the merits of the case. Such being his position, he thereby waives all objection to the ruling of the court on the demurrer. *Steamboat Kentucky* v. *Brooks, et. al.*, G. Greene, 398; 1 Scam., 222, 310, 281, 472. But the court erred by rendering judgment for the plaintiff without regarding the defendant's plea of the general issue. Before entering final judgment this should have been disposed of. The filing of the plea is all that is required by the practice in order to give notice of it to all concerned. When a plea is regularly filed in the case, the court, as well as the parties, should recognize it. There is nothing of record to show that the plea had been abandoned by the defendant. It is, therefore, reasonable to presume that the defendant intended to rely on this plea and assert his rights under it. *Miller* v. *Hardacre*, 1 G. Greene's R., 154; *Merryweather* v. *Gregory*, 2 Scam., 32–3; *Hereford* v. *Crow*, 3 Scam., R. 426. These cases are all in point. On this last position, the judgment of the district court is reversed, and the cause remanded to be tried on the issue presented by the plea on file, upon which the action of the court was not had.

Judgment reversed.

H. B. Hendershott, for plaintiff in error.

Charles Negus, for defendant.

Mc Clung & Co. *v.* Lyster.

In a compromise by which the creditor agrees to take in satisfaction, less than the amount his due, if the debtor fails to comply with the terms of the compromise, the creditor is entitled to the full amount of his claim. (a)

Error *to Mahaska District Court.*

Opinion by Kinney, J. The plaintiffs filed claims to a large amount, against the estate of Smith, before the probate judge. Trial had, and fourteen hundred and sixty-two dollars and ninty-eight cents allowed as third class debts. The administrator appealed, and during the pendency of the cause in the district court, the following agreement was entered into:

It is hereby agreed between the parties, that the following are the facts, and that they shall govern the decision in this case, as follows, to-wit: That the plaintiffs are the holders of certain promissory notes given by the defendant's intestate mentioned and set forth in the transcript of the probate court. That on the 27th day of September, 1849, a compromise was agreed upon between plaintiffs and defendant's intestate, whereby defendant's intestate agreed to pay certain sums of money to the plaintiffs, in the manner and upon the terms and conditions mentioned in a certain receipt, signed by Seevers and Temple, attorneys for plaintiffs, dated September 27, 1849, among the papers, and that the draft mentioned in said receipt was presented to Wade, Stille & Co., on the 23d day of October, 1849, who then paid the plaintiffs, on the same, $421 74, and that the residue of the same has never been paid; that said Wade, Stille & Co., as well as the plaintiffs, reside in St. Louis; that upon the presentment and new payment of said draft said plaintiffs informed the attorney's, Seevers and

(a) *Funduss* v. *Markle*, 2 G. Greene, 553; —— v. —— *ante*.

Temple, of the fact by letter, and that said Seevers, as attorney for said plaintiffs, thereupon informed defendant's intestate that said draft had not been paid by Wade, Stille & Co., as herein set forth, and requested said defendant's intestate to pay the residue of said draft, amounting to $39 88, which defendant's intestate refused to do, saying that he had already paid enough; that the plaintiffs had received previous to the commencement of this suit in Probate Court, all the money mentioned in said receipt signed by Seevers and Temple, attorneys for plaintiffs, dated September 27th, 1849, excepting the above mentioned sum of $39 88, still remaining unpaid on said draft, and that they have never offered to pay the same back to the defendant or his intestate, and that the following is a copy of the draft and endorsement herein referred to:

"MESSRS. WADE, STILLE & Co.,

Please pay Morgan Mc Clung & Co., or order four hundred and seventy-one dollars and sixty-two cents, and charge the same to yours. M. L. SMITH.

Sept. 27th, 1849."

Endorsed on the back:

"Received on account of the within draft, four hundred and twenty-one and seventy-four one hundreth dollars.

MORGAN McCLUNG & CO.

October 23, 1849."

The following is the receipt referred to in the above agreement, which was executed at the time the draft was given:

"1849, Sept. 27th. Received of Matthew L. Smith, a draft on Wade, Stille & Co., for four hundred and sixty-one dollars and sixty two cents, and one hundred and ninety-one dollars and twenty-eight cents in cash; and six hundred fifty-two dollars and ninety cents by note, and

mortgage on Thomas Tallman, and when the above draft on Wade, Stille & Co., is paid, then the said Smith to be released from all liability on the within described notes, given to Morgan McClung & Co., signed,

SEEVERS & TEMPLE,
Attorneys for Morgan McClung.

The court rendered a judgment, affirming the allowance of the probate court, of all notes and demands not mentioned and included in the above receipt, and reversing the allowance of all demands embraced in said receipt. The question raised by that part of the decision reversing the allowance of the probate court, is this: As the draft was not all paid, have McClung & Co., a right to resort to their original demand, treating so much as was paid on the draft as credit upon the amount due from the estate? To settle this question it is only necessary to ascertain the condition upon which the deceased was to have been released from all liability. It is not denied but that he justly owed the plaintiffs a large amount over and above what they received in the compromise. If no compromise had been entered into, the defendant's intestate was legally liable for the whole amount.

An arrangement was made by which the debtor was to be greatly benefitted by being released from the payment of a portion of his just debts; but by the very terms of the contract, this release was upon one condition, which was the payment of the draft received on Wade, Stille & Co., which formed a part of the compromise payment. This draft was not all paid. That fact was communicated to the debtor, and payment of the residue requested, which was refused. No objection was made to the manner of notice. Upon such refusal, it was the privilege of the plaintiffs to claim the balance due thereafter, deducting the amount received; and this is upon the plainest principles of justice and common sense. It is a matter of favor altogether, that

the plaintiffs agreed to accept a less amount for the whole. There is no evidence that Smith was in failing circumstances, or that it was for the interest of McClung & Co., to enter into the compromise. The amount due the plaintiffs was certain, fixed, and liquidated, and hence it was not for the purpose of settling a disputed or litigated claim that the compromise was agreed upon.

The compromise then, for ought that appears, was purely for the benefit of the debtor. As it failed by reason of his negligence, McClung & Co., by insisting upon the amount actually due them, only obtain that which they are legally and honestly entitled to, and the estate is only called upon to pay a just debt.

But, it is said, that the plaintiffs must rescind and return all they have received. This rule does not obtain in cases like the present. It was no fault of the plaintiffs that the draft was not paid, and the defendants discharged from liability, but as we have said, the fault of the debtor; he failed to make the compromise effectual. The plaintiffs, by retaining the amount received, only keep what they are justly entitled to. It is admitted in the agreement that the money was received on the note secured by mortgage, mentioned in the receipt. We see no propriety in requiring plaintiffs to return money paid toward satisfying a just debt, and which, if returned, could be recovered back. It was the intestate who forfeited the contract, and it is the privilege, though not the duty, of the plaintiffs to rescind.

After a consideration of a series of well considered cases, involving principles similar to those contained in the cases before us, we have no difficulty in coming to the conclusion that McClung & Co., are entitled to an allowance of their claims against the estate, the same as though the receipt had not been given, by deducting the amount they have received. *Cumber* v. *Wade*, 1 Smith. Leading Cases, 329; *Fitch* v. *Sutlow*, 5 East. 230; 5 Blackf. 17; 10 N. H. 505; 4 Watts. 452; 9 ib. 273; 5 Wheat. 487; *Cutler* v. *Powell*,

2 Smith's Leading Cases, 1, and notes; 4 Blackf. 222; 9 Mass. 78; 15 ib 500; Chitty on Con. 737–41–60.

Judgment reversed.

W. *H. Seevers*, for plaintiffs in error.

W. *T. Smith*, for defendant.

Devin *v.* Harris.

No private arrangement between partners, by articles or otherwise, will bind third parties, without actual notice.

A change in a partnership will affect persons dealing with the firm, without actual notice.

Where the record does not show that there was not sufficient evidence to justify the verdict, the discretion exercised below, in refusing a new trial, will not be disturbed.

Error *to Wapello District Court.*

Opinion by Greene J. Assumpsit by Harris against Devin, as surviving partner of the firm of Lane & Devin. The action was commenced to recover money claimed to have been received by said firm for a land warrant. It is conceded that the warrant was received and sold by Lane, and that the money he received has not been paid to Harris, though demanded of Devin as surviving partner of the firm.

It was claimed by the plaintiff below, that although the money may have been received by Lane alone, it was still received by him as a member of the firm, in the usual course of their partnership business, and that the plaintiff

trusted the firm, and not the individual Lane. Plea, general issue; verdict and judgment for the plaintiff.

Objections are now urged to the instructions given by the court below. It appears that the following was given by request of the plaintiff's council: "No private arrangement, by articles of partnership or otherwise, will bind third persons, without actual notice." An arrangement between partners, which is merely private in its character, entered into for the private benefit or indemnity of a member of the firm, is entitled to but little favor, when in conflict with the rights of third partners. Such an arrangement is not authorized at common law; and is very different from a limited partnership, which might be entered into by virtue of the statute. In regard to each other, the parties could with propriety regulate their concerns, in a private manner, to please themselves; but such private regulations could not control their responsibility to others, even if an ordinary notice of such arrangement had been given. In all dealings of a partnership with third persons, the law inculcates good faith, and open, undisguised dealing. Kent declares each member answerable *in soledo*, to the whole amount of the debt, without reference to the proportion of his interest, *or to the nature of the stipulations between him and his associates*. 3 Kent, 32.

Even when credit is secured to a firm by the misrepresentation or concealment of one partner, all will be responsible, although ignorant of the transaction, and, although, there was a private agreement between them limiting their liability, unless the party had knowledge or notice that the partner was acting *mala fide* or beyond his authority. Story on Con., § 224. In the case at bar, it is not pretended that the partner acted *mala fide* or beyond his authority. But the instruction objected to, appears to have been predicated upon the hypothesis that there may have been some private arrangement between the partners, and we think that if there was any such arrangement, nothing

short of actual notice should render it available agaist third persons. A notice, merely constructive or implied, and which may never have been really brought to the attention of such third party, we cannot consider sufficient to render a merely private arrangement effectual against the demands of third persons. We therefore think there was no error in the instruction as given.

It is also contended, that there is error in an other instruction, which was given in the following words: "Where the terms of the partnership are changed by the partners, actual notice to persons dealing with the firm, must be given of such change, or the firm is bound by the public notice of partnership." A change in the number, terms, or condition of a partnership, in order to be valid and effectual in its application to third persons, requires as high a degree or kind of notice as would be necessary in the safe and effectual dissolution of a partnership. Unless due notice is given of a dissolution or change of partnership, a contract will be valid where made by one partner on the faith of the partnership, with a person who had no notice of such change or dissolution. Constructive or implied notice, or notice in a city or county newspaper, under ordinary circumstances, has been adjudged sufficient. But even that notice would not be deemed sufficient, if the party entitled to it should be so situated that the notice would not be likely to come to his knowledge. Notice given in a newspaper would not be actual or express, but it would be such as a jury might infer notice from, so as to conclude all persons who have not had any previous dealings with the firm. 3 Kent, 66. It is laid down by this author, that persons who have been in the habit of dealing with the firm, are only affected by actual notice, or notice given under circumstances from which actual notice may be inferred. It is generally held that actual notice must be given to those who have had previous dealings with the firm; and that constructive notice, or such as would be given through a newspaper, is not

sufficient. *Watkinson* v. *B'k of Penn.*, 4 Whart., 482; *Mouldin* v. *Branch B'k*, 2 Ala., 502; *Prentiss* v. *Sinclair*, 5 Verm., 149.

We conclude, that the court correctly instructed the jury that a change in the partnership will not affect the persons dealing with the firm without actual notice.

A motion was made in the court below for a new trial, and it is now contended that the court erred in overruling that motion. The grounds for this motion are set forth in an affidavit, but it contains nothing which would justify this court in disturbing the discretion which the court below is authorized to exercise in relation to such applications. Though it is claimed that Devin did not assume or recognize any liability for the warrant, still there is nothing proposed to show that the warrant was not received and sold, in connection with the partnership business, nor that the warrant was not placed in the hands of Lane on the credit of the firm. The record does not show that there was not sufficient evidence submitted, to justify the verdict of the jury. We must therefore, conclude, that the verdict was fully authorized, and that the court properly overruled the motion for a new trial.

Judgment affirmed.

Geo. G. Wright, for plaintiff in error.

W. H. Brumfield, for defendant.

Kemp & Doggett *v.* Coffin.

After a dissolution, the settling partner may sign the name of the firm to a note, to settle or liquidate a company debt, but not to cast a new indebtedness against the firm.

Error *to Wapello District Court.*

Opinion by Williams, C. J. Jesse Kemp and Presley Doggett partners, &c., brought suit against Thomas C. Hunt, in assumpsit on a promissory note. The note is joint and several, by which Coffin and Hunt as partners, and Thomas C. Coffin, the defendant in this action, promised to Kemp and Doggett three hundred and ninety-eight dollars and twenty-three cents, on or before the first day of February, 1846, with interest from date, at the rate of six per cent per annum, until paid for value received. The note bears date the 1st day of February, 1842. The note is signed in the name of the firm of Coffin & Hunt, and by Thomas C. Coffin as security.

The cause was tried at the September term, 1850, for Wapello county, and was, by the consent of the parties submitted to trial, to the judge, without requiring a jury. Judgment was rendered for the defendants for cost. Thereupon the plaintiffs sued out a writ of error, by virtue of which, the case has been brought to this court for adjudication.

The bill of exceptions sets forth the material facts of the case, as agreed on by the parties, together with the decision of the court below, as to the law, and is as follows: "Be it remembered, that on the trial of this cause, which by agreement of the parties, was submitted to the court without a jury, the only evidence given, besides the note, was an agreement of the parties, in these words: "It is agreed by the parties herein, that the note sued on, was executed to

the plaintiffs, who were partners as alleged, under the following circumstances, in the manner mentioned below: Vestal W. Coffin and Hunt, by the name of Coffin and Hunt, were in partnership in Park county, Indiana, previous to the execution of the note; that while so in partnership, they became indebted to the plaintiffs, which is the original indebtedness for which the note sued was given. That previous to the execution of the note, the plaintiffs sued the said Coffin & Hunt on their indebtedness, and obtained judgment thereon, upon which execution issued and the property of defendants was taken thereon and offered for sale. That previous to the execution of the note, Coffin & Hunt had dissolved partnership, and given notice to the public, including plaintiffs, of such dissolution, and of their agreement that the business of the firm of Coffin & Hunt was to be settled by Hunt. That while the levy of the execution remained on the property aforesaid, and after the dissolution and notice aforesaid, Hunt proposed to plaintiffs, that if they would release the property from execution, he would execute the note sued on in the name of Coffin & Hunt, with the defendant Thomas C. Coffin as surety; and that accordingly the note was executed by Hunt, and by the defendant as surety, and the property levied on was released; upon which statement of facts, the court was of the opinion that the signature "Coffin & Hunt," to the note, was in law, the signature of Hunt alone; and that in the absence of evidence that the defendant knew of the dissolution, he is to be considered as having signed under the impression that both Coffin and Hunt were liable and responsible to him, as his indemnity. And further, the note so executed, was notice to the plaintiffs that the defendant signed it with that belief, and therefore it would be unconscientious, and in the nature of fraud to allow them to recover against the defendant, and so the court filed for the defendant." These being the facts of the case, and the judgment of the court thereon, the plaintiffs

made a motion for a new trial, on the ground that the finding was against the law and the evidence. This motion was overruled, to all which the plaintiffs excepted.

The error assigned is, that the court erred in rendering judgment for the defendant.

Although it is, in many cases, difficult to make such an application of the rules of law regulating partnership concerns as will clearly, and satisfactorily, result in just conclusions, we think the facts set forth in the bill of exceptions, as agreed upon by the parties, make this one of easy adjustment. Two questions are here presented in order to settle the law of this case: 1st. Was the firm of Coffin & Hunt indebted to Kemp & Doggett prior to the dissolution of the latter, as a firm? If so, was the note sued given to settle and secure that indebtedness of Coffin & Hunt to the plaintiffs: Hunt being, by the terms of dissolution, authorized to settle and adjust the business of the firm? 2d. Had the parties in interest here notice of the dissolution of the firm of Coffin & Hunt, and of the terms of that dissolution?

It is clear from the agreed case, that the indebtedness of Coffin & Hunt to Kemp & Doggett had been created, and existed, before the dissolution of the former; that they had been sued, and judgment obtained for the amount thereof; that execution had issued thereon, and property was under levy to satisfy it; that, at the instance of Hunt, one of the firm, who by the terms of dissolution, was authorized to settle up the business, the plaintiffs agreed to release the levy, by which their debt was secured; and, instead thereof, take the note of the firm with defendant as surety. Such being the state of the facts, the question of the right of Hunt to bind the firm of Coffin & Hunt by contract and render it liable on the note, is important in the decision of this case. That he was fully authorized to settle the business of the firm, which had been transacted during its existence, is conceded. Did he act on this principle when he adjusted the

matter of indebtedness to Kemp & Doggett, and in consummating this adjustment by giving the note in question? We think he did. It is fairly presumable that the arrangement was beneficial to the firm by saving the property from sacrifice. To allow them then to repudiate the note, would operate as a fraud, by enabling them, thereby, to avoid the payment of an existing and just indebtedness, while it was established and secured to their creditors, by due legal procedure. No new liability or indebtedness, was thereby created. It amounted to nothing more than the adjustment and security of a debt, contracted and due by the firm in its proper course of business; which, as the settling partner, Hunt was authorized to arrange. If Hunt could not do this, then, by the like reasoning, the settling partner of a dissolved firm could neither give nor take a note in settlement of partnership business, to close up the concern. We fully recognize the principle that one partner cannot bind the firm, after dissolution, by the creation of a new indebtedness or liablity. But we hold that this is not such a case; this is the case of just and legal indebtedness, to adjust and secure which, the note was given. This principle has been recognized and adopted in the case of *McPhuson* v. *Rathbone*, 11 Wendle, 96. It is there decided that, "although a partner, after dissolution, cannot bind his co-partner to the payment of a debt by note, yet he may liquidate a previous account by note, as by so doing, he does not create a debt." The reason, upon which this principle is adopted, is, that the transaction is in accordance with the usual course of business, and is proper and often necessary for the protection of the rights of partners, and their creditors. In the case at bar, any other decision, as to this principle, would cause the law to operate in perpetration of a fraud upon a *bona fide* creditor, to the destruction of his right where it was secured. In the case of the estate of Davis and Desauque, 5 Wheaton, 530, this just principle is recognized. It is there held, that "after dissolution,

the partner who is authorized to settle the business may borrow money on the credit of the firm, for the purpose of paying the debts of the firm, and if the credit is given in good faith, though with a knowledge of the dissolution, and the money is faithfully applied to the liquidation of the joint debts, the creditor has a claim against the firm, and is not to be considered as a creditor merely of the partner borrowing." In the case at bar the taking of the note, for aught that appears, was in good faith, and could operate only to benefit the partnership concern; and such was the effect of the transaction. It was applied to the purposes of the firm in settling up its legitimate business concerns; instead of binding them to new and illegitimate burdens or responsibilities, it worked for them beneficially, in saving their effects for all the interests involved. Although the effect of the dissolution of a partnership is to disable any one of the partners from contracting any new obligations, or engagements on account of the firm, still, notwithstanding the dissolution, there remains with each of the partners, or with the settling partner, certain powers, rights, duties, authorities and relations between them, which are indispensable to complete, arrange and settle up the affairs of the firm. Among these is, the completion of all the unperformed engagements of the firm, the protection and conversion of all the property, means and effects of the partnership, existing at the time of the dissolution, for the benefit of the firm, and those interested in its solvency. See Bouvier Law Dic., partnership, § 22, p 280; Story on Part. 324. Instead of holding the principle here involved, to such an extreme operation, as to permit it to work manifest injustice, as well as inconvenience, we deem it to be the duty of courts, while they will be careful to protect the partners of a dissolved firm on the maintainance of their legitimate rights, to see that they are required to acquit themselves of their just and legal responsibilities. The liability of partners, under contracts, is commensurate and

co-extensive with their rights. If a settling partner can liquidate, or arrange an open account by taking a note in favor of the firm, after dissolution, where that account had accrued during the existence of the firm, in the due course of its business, we cannot see why he may not, in such case, give one to adjust or liquidate an indebtedness.

It has been contended for the defendant in this case, that he signed and executed the note sued, as the security of the firm of Coffin & Hunt, and he seeks to be released, on the ground that as they were not liable, he is not. As we are of the opinion that Hunt in making the note, as settling partner of the firm, rendered it liable, this defence fails. The record, by the agreement of the parties, shows that they had notice of the dissolution of the firm of Coffin & Hunt, so that the allegation of fraud in this respect, is not sustained. The whole transaction as of record, before us, seems to have been at the time of the making of the note, one of good faith. We cannot presume otherwise.

Judgment reversed.

W. H. Brumfield, for plaintiffs in error.

A. Hall and *Geo. May*, for defendant.

Davidson *v.* Overhulser.

Cumulative evidence may be introduced by plaintiff for the purpose of rebutting defendant's testimony.

Where payment was to be made in sawing, and the payor gave notice of a readiness to do the work, but the payee neglected to deliver the logs to be sawed before the mill was carried away by a freshet; held that the destruction of the mill did not convert this into a cash claim, unless the sawing was demanded and not furnished within a reasonable time.

Error *to Van Buren District Court.*

Opinion by Kinney, J. Suit brought before justice of the peace on account, and for damages for improperly cultivating a farm which the plaintiff had leased to the defendant. Judgment for the plaintiff. Defendant appealed. On the trial in the district court, it appears from the bill of exceptions, that the plaintiff, to establish the item of damages for bad cultivation of corn crop, introduced a witness to prove the number of times the corn was ploughed, who testified that he was through the field after the corn "was laid by," and found on examination, that one field had been ploughed but once, &c. Similar testimony was given by other witnesses. The plaintiff, after proving the damages by reason of the land not being cultivated in the manner required by the terms of the contract, rested his case. The defendant then introduced witnesses whose testimony was in direct conflict with the testimony of the plaintiff, in relation to the cultivation of the corn. These witnesses testified that the field of corn, mentioned by the plaintiff's witnesses, was ploughed twice and harrowed once, &c.

The defendant having rested, the plaintiff called another witness who had examined the fields, and requested him to state how many times they had been ploughed. The defendant objected to this evidence, for the reason that it was but an accumulation of the same kind of evidence given by the plaintiff in the first instance The plaintiff contended that

it was only rebutting, as it went to show the testimony of the defendant to be untrue. The court sustained the objection and excluded the testimony, and this ruling is assigned—among others which we will hereafter notice—as error.

The testimony offered by the plaintiff was clearly of a rebutting character, and as such, was proper to go to the jury. By the testimony first introduced, he had proved all that was necessary to entitle him to recover. In the absence of any evidence tending to destroy or weaken the case thus made, the plaintiff was entitled to a verdict. His case was complete and perfect, without further testimony. Hence, there was no necessity in the first instance of introducing other witnesses. The plaintiff had used the number of witnesses allowed by the statute to establish a single point, and he could not be required to anticipate the defendant's defence by introducing more witnesses in confirmation of a particular fact, than the statute authorized. If the defendant's testimony had not been of such a character as to destroy or impair the testimony of plaintiff, it would have been improper for him to have called other witnesses in support of those first examined; but as it was in direct conflict, it was proper either to impeach the witnesses directly, or to rebut by showing, as was attempted in this case, that what they testified to, was untrue. Therefore, we think the court erred in excluding the rebutting testimony offered by the plaintiff. The instructions of the court are also assigned for error. It appears that the defendant claimed as a set-off to the plaintiff's demand, an item for work done on a mill-dam. The plaintiff insisted that she was not liable to pay for it, for the reason that it was to be paid for in sawing at the mill, and that she gave notice of her readiness to do it. The mill, it seems, had been carried away by the high water. The court instructing upon this point say: "If when the mill was destroyed he, the defendant, was not in default, he was still entitled to the sawing, but as the sawing could not be done, it need not be called

for, but it becomes at once a money debt, as soon as the plaintiff lost the ability to pay in sawing." This was error. This item in the defendant's account, was to be discharged in sawing. The mill on which, no doubt, the plaintiff intended to perform the work was destroyed by a flood, which the plaintiff could neither prevent or control. Did this fact excuse the defendant from making the demand, and was his claim thereby converted into a cash debt? We cannot for a moment think that the legal duties and rights of the parties can be discharged and changed by any such result. The fact that the mill was destroyed might or might not take away the ability of the plaintiff to do the work by the time the defendant would furnish the logs and demand the sawing. It is not impossible but that the plaintiff might have rebuilt the mill and been fully qualified to discharge the indebtedness, according to the contract; or before she would be willing that it should become a cash debt, she might have obtained the sawing at another mill, and returned the lumber where the sawing was to have been done, so that the defendant would not suffer the least inconvenience by reason of the sawing not being done on the mill destroyed. Be that as it may, the destruction of the mill would not excuse the defendant from making the demand which the law requires, or justify the court in presuming it was not in the ability of the plaintiff to furnish the sawing according to the contract. It appears that while the mill was standing, that the plaintiff had given notice to the defendants of her readiness to do the work. The defendant not having furnished the logs when it was in the power of the plaintiff to do the sawing, and the mill having been carried away by the act of God, we think after a demand made, the plaintiff should have such time as would be reasonable under all the circumstances, to do the sawing before the claim of the defendant would become a cash demand.

The instructions of the court on this point are, therefore,

erroneous, and the jugment is reversed, and a trial *de novo* awarded.

Judgment reversed.

A. Hall, for plaintiff in error.

Geo. G. Wright, for defendant.

KITE & WELCH *v.* BONAFIELD.

The judgment entry stated that "the parties, by their attorneys, submitted the cause to the court;" held that this was not sufficient to show the appearance of one of two defendants on whom no service was had.

ERROR *to Jefferson District Court.*

Opinion by GREENE, J. This was an action of debt in the district court, by Bonafield against Kite and Welch. The summons appears to have been served upon Welch only, but judgment was rendered against both defendants. But it is claimed, that although there was no service upon Kite, the record shows that there was an appearance for him by counsel. The only evidence of such appearance, is in the judgment entry, in these words: "And now come the parties, by their attorneys, and submit this cause to the court," &c. It is evident that the parties may have appeared and submitted their cause to the court without the appearance of Kite. The plaintiff and defendant Welch, would constitute "parties," who may have appeared by their attorneys, and still Kite may have had no notice of the proceedings against him. Had the records shown that the defendants appeared by their attorneys, the judgment below would

not be disturbed. In the absence of service and of such a showing, the judgment as to Kite is manifestly erroneous and must be reversed at cost of defendant in error, but the judgment against Welch is affirmed.

Judgment reversed, as to Kite.

C. W. Slagle and *Geo. Acheson*, for plaintiffs in error.

Charles Negus, for defendant.

McCall *v.* Bradley, *et. al.*

An appeal from a justice of the peace to the district court, in an attachment suit, will not release the plaintiff from liability on his attachment bond; as the appeal bond is not substituted for the attachment bond.

Error *to Wapello District Court.*

Opinion by Williams, C. J. This cause was originally instituted and tried at May term, 1848, in the district court of Wapello county. A verdict and judgment was then entered thereon in favor of the plaintiff. Upon a writ of error to this court, at June term, 1849, the judgment of the district court was reversed and a trial *de novo* awarded. A writ of procedendo was issued to the court below, and at February term, 1850; the cause was again tried by the judge without the intervention of a jury. Judgment of non suit was entered against the plaintiff, on the ground that the attachment bond could only apply to the proceedings, and their results, before the justices. That the effect of the bond under the attachment did not extend to the appeal, and that the failure of Bradley, the plaintiff in the original

suit, to recover, on the appeal, was no breach of the condition of the attachment bond.

The only question for decision here, is, as to the effect of the attachment bond, which, under the provisions of the statute, was filed by the plaintiff upon commencing his action before the justice. In this case, an appeal was taken from the judgment of the justice, as allowed and provided for by the statute. Upon trial in the district court, the plaintiff failed to recover. The property of the defendant had been seized, and was held by the writ of attachment, pending the suit before the justice, and in the district court. Upon the failure of the plaintiff to recover against him, he resorted to his remedy on the attachment bond for indemnity in damages, by suit against Bradley and his security, Mason. Did the taking of the appeal to the district court, from the judgment of the justice, release the attachment plaintiff, Bradley, and his security, from the obligations of the attachment bond? Or, is the effect of an attachment bond confined and limited by the "act regulating proceedings before justices of the peace" merely to such proceedings, while pending before the justice? We think that the statutory provisions, as well as just reasoning, in view of the rights of parties litigant, furnish an answer to this question, which will not admit of doubt.

Rev. Stat. 315, § 3, provides that "suits may be instituted before a justice, either by voluntary appearance, and agreement of the parties, or by process, and the process for the institution of a suit before a justice, shall be either a summons or warrant against the person, or attachment against the property of the defendant." The justice, before whom the suit is brought, is required to "endorse upon the summons, or warrant, or writ of attachment, the amount claimed by the plaintiff, including interest and costs. Rev. Stat. 317, § 15. Here is express statutory provision, authorizing a plaintiff to commence his suit before a justice of the peace, by writ of attachment, and requiring an endorsement

of the amount claimed on the writ, so that the defendant, upon his first knowledge of the suit and demand, may save trouble and costs by paying the debt to the officer, and thus put an end to litigation. The writ having issued, the justice, having jurisdiction of the subject matter, if the debt be not paid as above upon service of the writ, is required in due course to proceed to judgment. Judgment being rendered, either party may appeal from the decision of the justice to the district court. And "any person aggrieved by *any* judgment or decision of a justice of the peace, may in person, or by his agent, make his appeal therefrom to the district court of the same county, where the judgment was rendered or the decision made." Rev. Stat., 333, § 1.

When an appeal is taken, the justice must "file with the clerk of the district court, of the proper county, a transcript of all the entries made in his docket relating to the case, together with all the process and other papers, relating to the suit, filed with the said justice, five days before the first day of the term of the said district court, next after said appeal was allowed." Thus by these provisions of the statute, the whole case, *ab initio*, is removed to the district court, as the appellate tribunal, to be there tried and decided. The district court being possessed of the cause, it is required to "proceed to hear, try, and determine the same anew."

It is true, that the statute, providing for the taking of an appeal from the judgment of a justice of the peace, requires the appellant to give a bond with security, for the prosecution of his appeal with effect, so as to secure the rights of the appellee. But there is nothing in this provision, which is, in the least, incompatible with the rights of parties as existing, by virtue of the attachment bond. The propriety and necessity of that bond, for the security of the rights of the attachment defendant, whose property or effects had been seized, and kept, to secure the payment of the sum of

money, for which the plaintiff might obtain judgment finally, in the district court, on the appeal, is apparent; such, clearly, was the design of the legislature. In such a procedure, where property is, by the first process, summarily attached and held in custody of the law, and where the right of appeal is given, if the defendant were the appellant, and on trial, in the district court, he should, as in this case, succeed in defeating the plaintiff's action, he would be without remedy for all the money he had sustained by the act of the plaintiff in divesting him of his property without cause. This proceeding, by attachment, is intended for use in extraordinary cases, to prevent injustice, fraud and inconvenience to *bona fide* creditors, by dishonest debtors; or those who seek to avoid the payment of honest debts, and whose property and effects cannot be reached by the ordinary process of the law. It is susceptible of abuse by the reckless and illadvised. By such, it may be made the means of oppression and ruin to the honest, but unfortunate debtor. This, doubtless, the intelligence of the legislature discerned, and hence an indemnity for the money was provided.

But, in addition to this view of the case, the law providing for the writ of attachment, in the justices act, clearly contemplates that creditors, whose demands do not amount to more than fifty dollars, and not less than five dollors, may sue their debtors by attachment. It expressly provides that, "writs of attachment shall be issued and returned in like time and manner as ordinary writs of summons, and, when the defendant is summoned to answer, the like proceedings shall be had between him and plaintiff, as in ordinary actions on contracts, and a general judgment may be rendered for or against the defendant;" and that "the writ shall be served upon the defendant as an ordinary summons." Rev. Stat., 339, §§ 1, 3, 4. Thus the action may be instituted by the writ of atttachment alone, and conducted through-

out, as in the case of an ordinary summons, to final judgment, either before the justice, or upon appeal from his judgment, in the district court, so far as the proceedings are concerned. The attachment bond, given by the plaintiff, and required by the statute, before he was permitted to issue his writ, contemplates, and provides for, his responsibility to the defendant for damages for issuing the attachment "if he shall fail to recover judgment thereon," &c. From the whole proceedings, as prescribed by the statute, as well as its peculiar character in relation to the rights of the parties, it is impossible for us to discover by what rule of law or justice, an appeal to the district court, from the judgment of the justice, should release the plaintiff from the responsibility incurred by his attachment bond.

He had the right of appeal upon giving bond with security, &c. Having taken his appeal he is only bound by his appeal bond, with his security, to "satisfy the judgment of the district court, if it be given against him, or if the appeal be dismissed, that he will pay the judgment of the justice, together with the costs of appeal." This is an obligation altogether different from that of the bond required by the attachment law, upon the issuing of the writ. The condition of the latter, is, "that he shall pay to the debtor all damages and costs which he may sustain by reason of the issuing of such attachment, if the creditor fail to obtain judgment thereon, and if such judgment be recovered, that such creditor will pay the debtor all the money which shall be recovered by him from any property levied upon and sold under such attachment, over and above the amount of such judgment and interest and costs thereon." In design and substance, the bonds are entirely different. To give to the appeal bond the effect of a release as to the attachment bond, would, we think, be entirely subversive of right, and contravene the manifest intention of the legislature, by leaving the defendant in the proceeding by attachment, without

redress in damages, for the injury sustained by reason of the wrongful suing out of the attachment.

Judgment reversed.

H. B. Hendershott, for plaintiff in error.

J. H. Cowles, for defendant.

HAMMITT *v.* COFFIN.

A judgment will not be reversed for a proceeding that cannot prejudice the plaintiff in error.

On an appeal from a justice of the peace the surety in the recognizance was wanted as a witness, and a new recognizance was authorized in the district court.

ERROR *to Wapello District Court.*

Opinion by KINNEY J. Coffin sued Hammitt before a justice of the peace, upon an account for boarding and clothing his daughter, and for medical attendance. Hammitt filed an account as a set-off for the services of his said daughter. Trial by jury, and verdict for the defendant, and judgment in his favor for costs. The plaintiff appealed, and a verdict having been obtained against the defendant below for a small amount, he brings his case to this court, and assigns for error:

The court erred in making an order to correct the appeal bond, and in permitting one, Wood, to testify in the cause, as said Wood was the surety in said bond.

Exceptions are taken to the ruling of the court upon the testimony, and also to the instructions to the jury, upon

which errors are assigned, which we do not consider necessary to notice. The assignment mainly relied upon in the argument is the one above stated. It appears from the bill of exceptions, that on the trial, the appellant called Wood as a witness, who was objected to on the ground that he was the security of the appellant in the appeal bond. This objection was sustained by the Court. The plaintiff then produced and filed in the court, and substituted in place of said appeal bond, a new appeal bond, with security, other than that of said witness. To this last named bond, the defendant objected as insufficient, which objection was overruled by the court, and plaintiff excepted. The objection to Wood, as a witness, was sustained by the court, and it nowhere appears in the record, that Wood was called again to the stand, after the court had ruled his testimony inadmissible. The exception is to the sufficiency of the bond. The bond is set out in the bill of exceptions; it was ruled by the court to be sufficient; it appears to be in conformity with the requirements of the statute, and in this respect unobjectionable. But it was urged in the argument, that the court had no right to permit the substitution. If this were so, and the substituted bond unavailing, as a security upon the appeal, still the defendant would not have any reason to complain, for the reason that no action has accrued to the defendant upon the bond, as the appellant succeeded in the district court, and it does not appear in the record that the rights of the appellee were in any respect prejudiced by the substitution. And if this was error in the court, this court would not reverse according to repeated decisions. Unless the alleged error has operated injuriously upon the plaintiff in error, the judgment will be affirmed. But, we think the court had a right to order a new bond to be substituted. The statute gives the appellant the right to enter new recognizance in the district court on an appeal from a justice of the peace, when for any reason, the one previously entered into, is defective. Rev. Stat. 33,

§ 11. The court have the power to receive and approve of the new bond filed, and when so filed before the court it is just as obligatory, and affords as perfect security to the appellee as if entered into before the justice of the peace at the time the appeal was taken. We have no doubt about the power of the court during the progress of a trial, if for any cause it should become necessary to require a new and different appeal bond from the one first given, to order such bond in substitution of the one taken by the justice. It is not for the appellee to say before the justice, who the surety in the bond shall be, or to receive or reject any one that is offered, but it is for the justice to approve or reject them, as sufficient or insufficient.

This answers the argument at bar, that the defendant could not be required to look to other and different security than that originally given. We will presume the court to act with as much caution in approving the security, and guard as closely the rights of the appellee on this point as the justice of the peace.

Judgment affirmed.

S. W. Summers and *W. H. Brumfield*, for plaintiff in error.

A. Hall, for defendant.

Perkins *v.* Testerment.

Depositions taken after trial in the district court, will not be entertained in the supreme court.

The supreme court cannot entertain original jurisdiction.

ON MOTION. *Appeal from Wapello District Court.*

Opinion by GREENE, J. A motion is made by appellee to suppress depositions which have been taken and filed in this case since the appeal from the district court. In chancery proceedings, this court is authorized to act only in an appellate capacity; to review and correct no other questions than those submitted to the decision of the court below. We possess, under the constitution, no original jurisdiction, and consequently cannot entertain any plea, issue or evidence, which has not been acted upon by the district court. That court must first decide upon the subject matter, before the authority of this court can be interposed. A cause can be tried upon no other record or document than such as is certified to this court by virtue of the appeal. Subsequent depositions would present new and original matters for decision, which would be unauthorized and *extra judicial.* The motion, to suppress the depositions taken since the trial below, is therefore granted.

Motion granted.

Geo. G. Wright, for the motion.

Geo. May and *H. B. Hendershott*, against.

Testerment *v.* Perkins.

T. filed his bill against the heirs of P. for land which was entered in the name of P. about two years before his death, but there was no evidence that T. furnished the purchase money, no written memorandum of the trust, no effort made by T., during the life of P., to obtain a deed, no objection made to P.'s converting much of the best timber to his own use, nor to his occupation and exclusive control of the premises; but there was doubtful evidence that P. declared, some time before his death, that the land was to be divided between him and T.; held that the circumstances do not create a trust, nor show equity in T.

In Equity. *Appeal from Wapello District Court.*

Opinion by Greene, J. Jesse Testerment filed his bill against William W. and Elizabeth E. Perkins, and Sarah Perkins, heirs at law of C. L. Perkins, deceased. Complainant charges that he had improvements and a claim upon lot 1, in sec. 35, T. 71, N. of R. 12 west; that his claim included eighteen acres of the north end of said lot, and that C. L. Perkins claimed the remaining portion; that by agreement complainant furnished to Perkins his portion of the purchase money for said land, and that said Perkins thereupon purchased the whole of said lot in his own name, at the Desmoines river Land Office, with the understanding that he should deed to complainant the portion of said lot which was included in his claim; that the agreement was by parole, and that no memorandum of it had been reduced to writing; that the lot was entered November 27th, 1848, and that said Perkins died in March, 1850, without conveying to complainant the eighteen acres claimed by him. Bill prays for a decree that the heirs of said Perkins deed to complainant the land in question. The facts stated in the bill are not sworn to, but all of them which tend to show a trust in said C. L. Perkins, are expressly denied by the answer of his widow, Sarah Perkins, and by the answer of Ervin A. Wilson, as administrator of the estate, and as

guardian *ad litam* of the infant heirs. These answers were made under oath, and that of Sarah Perkins appears to have been made with a full understanding of the circumstances under which the land was claimed and purchased by her husband.

The averments of the bill are only supported by evidence of declarations made by C. L. Perkins, some time before his death, to the effect that the lot in question was to be divided between him and complainant, who was to have about eighteen acres from the northern portion. But the testimony in relation to these declarations does not come before us in a very reliable form, and is mostly overcome by other evidence. Mere declarations made under circumstances which would not be likely to secure the attention of the person hearing them, and upon a subject about which he might be mistaken, should be received with much allowance. In the present case, the answers and depositions convince us that the principal witness, in behalf of complainant, must have been mistaken in the statements made to him by C. L. Perkins. The answer of Mrs. Perkins, showing that her husband had improvements on a portion of the eighteen acres in question, and the depositions of witnesses showing that Perkins had repeatedly cut logs and taken them away from said land, in the presence and without any objection from complainant, are not consistent with the testimony in relation to those declarations. If Perkins did not have the exclusive right to the property, and if complainant had any interest in it, the latter would be very likely to assert his rights and object to the depredations of the former, while in possession of the improvements and in the act of cutting and conveying away much of the best timber. If complainant had advanced the entrance money for the eighteen acres, and was entitled to a deed from Perkins, it is not likely that he would entirely fail in effort to obtain the title, from the time the land was entered, up to the death of Perkins. But, there appears to have been no

such effort made, no receipt given for the money, no objection made when the timber was carried off, and Perkins was permitted to enjoy the exclusive benefit of the premises from the time the land was entered up to the period of his death. These circumstances seriously militate against the efforts made by complainant to assert a right to the premises. Besides, one of the depositions sufficiently shows that Perkins did not enter the lot in question, with any portion of complainant's money, but with money that he obtained from B. C. Firman.

Upon a careful examination of the bill, answer, and depositions, we cannot resist the conclusion that the equity of the case is with the defendants, and that the court below was fully authorized in dismissing the bill.

Decree affirmed.

H. B. Hendershott and *Geo. May*, for appellant.

Geo. G. Wright, for appellee.

Ross *v.* Hayne.

Latitude and discretion recognized in the examination of witnesses.

On a cross examination, it is not error to put questions to a witness, with the object of impeaching him by other testimony.

In an action of replevin, on the question of ownership, a conversation with the party who claimed, and had, the property in possession, may be admissible in evidence.

A failure to render judgment of cost against either party, is not ground for error.

3g 211
86 497

3g 211
102 386

3g 211
107 382

ERROR *to Wapello District Court.*

Opinion by KINNEY, J. This was an action of replevin, brought by plaintiff against the sheriff of Wapello county,

to recover property taken on attachment against William G. Ross, at the suit of James Hawley; verdict and judgment in the district court, for the defendant, for a portion of the property replevied, the jury having found the same to have been the property of William G. Ross, at the time the attachment was sued out. The plaintiff brings the case to this court on a writ of error, and assigns for error:

1st. The court erred in permitting the defendant in error to examine the witness, Lewis, as to what the witness, Sinnamon, had stated, for the purpose of impeaching said witness.

2d. The court erred in admitting the testimony of Sears and Gaylord as to what William G. Ross said, with reference to the property in dispute.

3d. The court erred in not rendering judgment against the defendant for cost.

The first and second assignments are made upon the ruling of the court, as contained in the bill of exceptions. It appears that Sinnamon was called as a witness for plaintiff. He was examined in chief, and then cross-examined by the defendant, after which, he left the stand. The plaintiff having rested his case, the defendant, in the course of his evidence, called the said witness again, and asked him whether he had not sold the cattle, before referred to, to William G. Ross, and the witness said not. He was then asked whether he had not told Mr. Lewis that said William G. Ross had purchased the cattle of him, he said he had not. The defendant then called said Lewis, and asked him to detail any conversation he had had with said witness, as to the purchase of said oxen by said William G. Ross, of him, said Sinnamon. To this plaintiff objected, on the ground that a party could not thus introduce a witness for the purpose of impeaching him, and then proceed to do it. But the court—from the fact that the trial had been conducted irregularly on both sides, to some extent without objection, under these considerations—permitted the defendant

to treat the last examination of the witness as a continuation of his first cross-examination of him, and so allowed the interrogatory to be put and answered by way of contradicting the witness; to which the plaintiff excepted.

In view of the manner in which this trial was conducted and the irregularities that were permitted, without objection on either side, we cannot think this ruling of the court sufficient to reverse this case.

It seems that a departure from the strict rules, appliable to the examination of witnesses, had been tolerated by the court with the consent of counsel, and hence the court permitted the witness to answer an interrogatory, which, under other circumstances, would probably have been improper. As a general rule, a party cannot call a witness, and after obtaining his testimony, call another one for the purpose of impeaching or contradicting the facts sworn to. But it will be recollected that Sinnamon was called as the witness of plaintiff, and as such, the defendant had a right to impeach him, and could have asked him any interrogatory for this purpose while on his cross-examination. If, then, the facts elicited, when the witness was called to the stand by the defendant, had been adduced on the cross-examination, there is no doubt but that the defendant could have called the witness, Lewis, to contradict the statement of Sinnamon. The court took this view of it, and considered the examination as a continuation of the cross-examination. We think the court in the exercise of that discretion which belongs to all courts, could properly do so, and the ruling on that point was not error.

From the bill of exceptions, it appears that Sears and Gaylord were offered by the defendants as witnesses to prove certain conversations that they had had with William G. Ross, at the time he was in possession of part of the property in controversy, as to the ownership thereof; to which plaintiff objected, but the objection was overruled and the testimony ruled by the court to be admissible.

We see no objection to this ruling of the court. The question of title to the property, was the question at issue. On the one hand it was claimed by the plaintiff, John W. Ross, to be in him; while the sheriff, on the other hand, was insisting that the property, at the time it was attached, was the property of William G. Ross, against whom the attachment issued. The fact that the property was in the possession of William G. Ross, taken in connection with his statements in relation to the ownership, though not conclusive evidence, as to whom the property belonged, we think was proper to go to the jury for their consideration. While John could not be divested of his title by the mere declarations of William, yet the fact that William claimed it as his own, was a circumstance on which the jury might place such reliance and attach such importance as the whole facts of the case would seem to justify.

The error assigned in relation to costs, it is not necessary to notice further than to say, that it does not appear from the record that the plaintiff is at all injured by reason of a judgment for costs not having been entered against the defendant.

It does not appear from the record, that judgment for costs was entered against either party, hence neither have a right to complain.

Judgment affirmed.

Geo. G. Wright, for plaintiff in error.

H. B. Hendershott, *B. Jones* and *A. Hall*, for defendant.

Hendrick *v.* Kellogg.

A matter of variance, involving no ambiguity or question of fact, is not for the jury, but should be decided by the court.

One of two joint and several makers of a note, was not served with process but he signed the appeal bond as surety; held that this act did not constitute an appearance, as principal.

Error *to Jefferson District Court.*

Opinion by Greene, J. Assumpsit on a promissory note, tried before a justice of the peace. Judgment for plaintiff. Defendant appealed to the district court; verdict and judgment rendered against him for the amount due on the note.

On the trial, the court was requested to instruct the jury that if they believe there is a difference in the note offered in evidence, and the one described in the transcript, they must find for the defendants. But the court refused to charge as requested, and informed the jury that the question of variance was for the court to decide, and that there was no sufficient variance to justify the exclusion of the note. This ruling of the court is assigned for error, and the case of *Jefferson county* v. *Ellis*, is cited to show the error. But we think the case cited bears no analogy to the case at bar. The question submitted to the jury in that case was not one of variance. In the date of the note, the month was so abbreviated, that the court could not determine whether it was "Jun." or "Jan." Evidence was therefore introduced to show whether the note was dated in January or June, and that evidence was referred to the jury. In the present case, there is no such ambiguity or uncertainty in the language of the note or of the transcript. The court could readily place a construction upon them and judge of any variance between them. A matter of construction or of variance between instruments, is obviously a question of law, to be decided by the court, and should

not be determined by a jury. The court below, therefore, did not err in refusing to submit this question to the jury, as requested, nor in deciding upon the matter of variance.

The note, in this case, was made by Hendricks and Jenkins, jointly and severally; but service was had only upon Hendricks, and consequently judgment was rendered against him only as a party to the note, but judgment was rendered against said Jenkins as one of the securities in the appeal bond. It is contended that this was erroneous; that judgment should have been against Jenkins as principal, so as to hold him jointly liable on the debt; and that his signature to the appeal bond was a sufficient appearance. This objection is, we think without foundation. The act of signing an appeal bond cannot of itself be regarded as an appearance, by which the person could be made a party to the suit so as to authorize a judgment against him as a principal defendant. This act merely made him a security in the appeal, and as such only, could judgment be rendered against him.

Judgment affirmed.

Charles Negus, for plaintiff in error.

Slagle & Acheson and *G. G. Wright*, for defendant.

Spencer *v.* De France.

A jury was passed upon, and accepted by both parties in the evening, whereupon the court adjourned, and the jurors separated; in the morning the plaintiff challenged one of the jurors; held that it was error to refuse him this privilege under the circumstances.

The right of challenge may be exercised until the jurors are sworn.

ERROR *to Jefferson District Court.*

Opinion by KINNEY, J. This cause was before the supreme court at the June term, 1850, and the judgment below reversed because of error in the instructions of the court to the jury. It was remanded for trial *de novo* and a jury was called, passed upon, and accepted by both parties. When the oath was about being administered, a question was raised in relation to leaving out a co-defendant, Kearns, in the oath to the jury; whereupon the court adjourned until morning. In the morning, when the jury were again called upon to take the oath, the plaintiff challenged one of the jurors without assigning cause, and the court refused to allow the challenge, as being irregular and out of time, and directed the jury to be sworn, which is the only error worthy of consideration in the record.

The question presented by the assignment of error is, may a party who has not exhausted his peremptory challenge, exercise the right up to the very moment the jury is called upon to take the oath?

However, after a party has once accepted a jury and there is no separation of the jury, or intermission of the court between such acceptance and the time the jury are called upon to take the oath, the party then objecting should advance some substantial reason why he did not, at the usual time avail himself of his peremptory challenge.

If the party has been taken by surprise by hastily accepting the jury, and if upon further reflection he becomes satisfied that there is a partial or prejudiced mind in the box, or if with unusual haste he has been forced to accept the jury, without having had proper time for reflection, or consultation, in furtherance of justice, we think the court should permit the party to exercise his peremptory challenge. Of course good care should be taken that the party

in raising the objection, after having signified his willingness to take the jury, is actuated by pure motives, and not by a mere disposition to disturb the pannel and delay the trial of the cause.

But if the jury become separated after they are empanneled and accepted, and thrown into positions, where they are liable to become impressed with the feelings and sentiments of designing men, we think counsel have a right to an unrestrained exercise of their challenge up to the very moment that the jury are required to take the oath.

In this case, in the evening the party was satisfied with the jury, but circumstances and influences may have changed them, so that in the morning some of them may have been quite different in their feelings from what they were the evening previous. They had not taken upon themselves the obligations of an oath, and hence under none of those restraints which honest jurors feel when duly elected and sworn to sit and decide upon the rights of their fellow men. They were not jurors at all until the oath was administered, and hence perfectly accessible to any one base enough to attempt to poison their minds relative to the merits of the case they had been empanneled to try.

Possibly some facts came to the knowledge of the party which would not constitute a good challenge for cause, but which would no less render them improper jurors to try the issue between the parties. Justice, the purity of jury trials, the importance of a correct and unbiased verdict, all unite in favor of the practice contended for by the counsel, for plaintiff in error.

It was error therefore, in the court, to refuse the challenge, and as we do not discover any other error in the record, the judgment is reversed upon this point, and a trial *de novo* awarded.

Judgment reversed.

Geo. G. Wright and *S. Clinton*, for plaintiff in error.
Slagle & Acheson and *C. Negus* for defendant.

McGuire *v.* Kemp.

Where the defendant appeared, pleaded, &c., in a trial by the court without a jury, and the record being silent as to the consent of parties to waive a jury, it will be presumed that the consent was given.

Error *to Van Buren District Court.*

Opinion by Greene, J. Assumpsit on a promissory note, by Solomon Kemp against David G. McGurie. Plea filed, cause tried without a jury, and judgment rendered for the plaintiff.

Defendant now seeks to reverse the judgment, on the ground that the record does not show that the cause was submitted to the court by agreement of the parties. The judgment entry states that "this cause came on for trial, whereupon the premises being seen and fully understood, it is considered by the court," &c. This entry is rather informal. It should state that the cause was submitted to the court by consent of parties, or that a trial by jury was waived. Still, we do not consider the irregularity sufficient to justify the court in reversing the judgment, when, as in this case, the record clearly shows that substantial justice has been done. The record shows that the defendant appeared in court, filed a plea, and also a motion which was disposed of; and as he took no exception to the manner in which the cause was tried, it must be presumed that he consented to a trial by the court. Had the defendant requested a jury, it would be error if the court had refused. But in the absence of such request where the plaintiff is entitled to recover on a note of hand, to which no defence is urged, and which calls for a fixed amount, a jury would be a waste of time, and a useless expense to the defendant.

Judgment affirmed.

A. Hall, for plaintiff in error.

Geo. G. Wright, for defendant.

Robertson *v.* Phillips.

Rails, not laid in a fence, are no part of the realty.

A. owned a claim on public land and had a quantity of rails, which were in piles at the time B. entered the land; held that the rails were no part of the realty, that they were the property of A., that B. had no right to sell them to defendant, who had taken them off, and that defendant was liable to A. for the value of the rails.

Error *to Mahaska District Court.*

Opinion by Kinney, J. Robertson sued Phillips before a justice of the peace, claiming eighty dollars, by reason of the defendant having taken four thousand rails. Jury trial and verdict for the plaintiff for $60,00. Defendant appealed and recovered judgment in the district court. Plaintiff brings the cause to this court and assigns for error the instructions of the court to the jury.

It appears that the plaintiff made a claim on the public land, and while in the possession and enjoyment of the claim, he made a large number of rails which were in piles on the land at the time it was entered, and which the defendant, by the authority of the owner of the land, hauled away. The instructions of the court amount to this, that if the defendant took the rails—after the land was entered—by the authority of the owner of the land, he is not liable. We have before decided that rails made and lying on the public land at the time the land was entered, did not pass to the purchaser, although made out of the timber growing on the land prior to the entry. They do not belong to the realty, and consequently do not follow the title. And such is the decision in the case of *Wincher* v. *Shrewsbury*, 2 Scam., 283, in which the court say: "A certificate of purchase or patent vests in the patentee a title to the land, and generally all that is growing on, or is in contemplation of law attached to the land, as houses, fences, growing timber,

&c. But that which has been severed from the land by the act and labor of man, converted into personal property, such as implements of husbandry, barrels, furniture, or even rails, when not put in a fence, or evidently intended to be so used, do not pass with it any more than the grain grass, or fruit, which has grown upon, and been gathered with it. In that case, the plaintiff who claimed and recovered the value of the rails, was a trespasser upon the public land, and there is not any evidence that he pretended to have made a claim upon the land when the rails were made. How much stronger is the case under consideration, for the plaintiff, who had established a claim, and when by our statute, claimants are protected in their possession and enjoyment.

By the Rev. Stat. 456, § 1, all contracts made for the sale of improvements on the land of the government of the U. S., are declared valid; and on page 457, it is provided that persons settled on public lands may maintain trespass, and their possession shall be considered on the trial as extending to the boundaries embraced by the *claim* of such person, so as to enable him to maintain the action without being compelled to prove an actual enclosure.

There could not be any doubt, under this statute, of the plaintiff's right to recover, if the rails had been taken away before the land was entered. If this is so, is it not equally clear—inasmuch as the rails do not belong to the realty or pass to the purchaser of the land and therefore remain the property of the plaintiff—that he may maintain his action and recover the value thereof?

The purchase of the land from the general government, does not change or restrict the rights of the plaintiff in this particular. If the rails belonged to him before the entry, no act of third persons to which the plaintiff was not a party, can divest him of his title to them. He has the same property in the rails as he had before the purchase, and his

right to recovery, was as perfect, as if the rails had been taken while the title remained in the United States.

But it is said that the defendant took the rails by the authority of the owner of the land. This is no defence.

If the owner of the land would not be justified in appropriating them to his own use, neither would any person whom he might send. That would be a hard rule indeed, which would compel an injured party, whose property had been taken away, to bring his action against a man who was utterly worthless and bankrupt, instead of the real offender, because he ordered the property to be taken. True, in assumpsit, as a general rule, the principal and not the agent is responsible. But in this case there is no implied consent on the part of the plaintiff to look to the owner of the land for the value of the rails. His property is taken without his knowledge or consent. He had his election either to replevy, to sue in trespass or assumpsit, and either of these actions could be brought against the individual who committed the act. If the plaintiff had sold the rails to the principal of the man who took them, or if he as the agent had taken them with the knowledge of the plaintiff disclosing his agency, then the law would compel the party to seek his remedy against the principal. But it is no defence to the action, that he, the defendant, was acting for another, and took the property by the authority of another, unless he can go one step further and show that the plaintiff recognized him in that capacity, or expressly or impliedly consented to the act with a knowledge of the relation which existed between him and his principal. A contrary doctrine from this would lead to the most alarming results. A. could tell B. to go and take the property of C. Without the knowledge of C., B. carries out his instructions, and is sued by C. to recover the value of the property thus taken. B. would reply in the defence, that he was acting by the authority of A., and the remedy was against his principal and not him. The principal may be

out of the country or entirely insolvent, and B. in the enjoyment of the property. We see but little difference in the case before us, except there is not any evidence as to whether the defendant or his pretended principal was in the actual possession of the rails at the time of the trial. As they were proven in the possession of the defendant at the time of the taking, it is but reasonable to presume them still in his possession.

We think the court erred in the instructions to the jury, and the case is therefore reversed, and a trial *de novo* awarded.

Judgment reversed.

C. Negus and *J. L. C. Crookham*, for plaintiff in error.

W. H. Seevers and *W. T. Smith*, for defendant.

McClish *v.* Manning.

Where a *cognovit* promised payment in ten months after date, but authorized a judgment at the next term of court after the date of the judgment note, and before it was due; held, that judgment could be entered at that term of court, with a stay of execution until the ten months elapsed.

Error *to Davis District Court.*

Opinion by Greene, J. In this case, judgment was confessed by James H. Cowles, Esq., as attorney, against Thomas McClish, in favor of Edwin Manning, on the 21st of April, 1848, for the sum of sixty dollars, with ten per cent interest thereon, from the 11th February, 1848, until paid, with costs. To this judgment, an order is appended,

that execution issue accordingly. These proceedings were by virtue of an instrument dated February 11, 1848, and signed by said McClish, in the following language, under seal: "Ten months after date, for value received, I promise to pay Edwin Manning, or bearer, sixty dollars, with interest at the rate of ten per cent till paid, without defalcation or discount. And further, I do hereby authorize and appoint H. B. Horn, or any attorney at law, as my true and lawful agent to appear for me at the next term—from the date hereof—or any subsequent term of the district court holden in Davis county, or elsewhere in the State of Iowa, and hereupon confess judgment against me in favor of the said Edwin Manning, for the above sum, with interest above mentioned and costs of suit, hereby waiving process, right of appeal, and stay of execution until the day of payment."

To the judgment rendered upon this instrument, several objections are now urged.

It is claimed that Manning was not entitled to a judgment until the expiration of the ten months stipulated in the note. But this position is explicitly controverted by the cognovit which authorized a judgment to be confessed at the next term of the district court after the date thereof. The intention of McClish to authorize a judgment against him, in favor of Manning, before the expiration of the ten months, admits of no doubt. It is expressed with clearness and certainty in the instrument. As between the parties, that intention must obviously govern, and so as to third parties in the absence of collusion and fraud. We regard it as a legitimate commercial transaction, in which a debtor may often avoid expensive litigation and distress by voluntarily and amicably securing the claim of his creditor, and at the same time secure indulgence on the execution. As a system of security, when *bona fide* entered into, it has never been regarded as seriously objectionable; it is a system adopted to an increasing extent in business transaction, and is by no means discountenanced by courts of justice.

So far have such judgments been judicially encouraged by recent decisions, that they have been held valid to cover advances made subsequent to their rendition. *Lee Hoven* v. *Keins*, 2 Barr., 96.

But the statute is cited as an objection to the judgment in this case. By Rev. Stat. 473, § 22, any person is authorized to confess a judgment by himself or his attorney, "for a debt *bona fide* due." This statutory modification does not, we think, refer so much to the time when a debt is payable as to its character. If the debt was genuine in its character, contracted in good faith, it might properly be considered a debt *bona fide* due, although by agreement made payable at a future period, in order to secure judgment on cognovit.

Besides, this statute is merely cumulative on common law principles, in relation to judgments by confession. The same general rules of law which prevailed before this enactment, are still applicable to such proceedings. Judgments by confession are encouraged at common law, as an amicable, easy and cheap way to settle and secure debts, and as the *cognovit* voluntarily acknowledges the justice of plaintiff's claim, and authorizes a judgment to be rendered at the next term of court, we see no reason why this intention of the parties should not be enforced. The only objection urged to this observance of the intention of the parties, is the statute to which we have referred, on the ground that the debt was not due. We think that no debtor would be likely to sign a judgment note, and authorize a judgment against himself at so early a day, on any other "than a debt *bona fide* due;" nor would he be likely to promise and authorize the payment of ten per cent interest upon a debt not due. We conclude then, that this judgment note was given for a debt "*bona fide* due;" that it authorized a judgment for the amount of the indebtedness, drawing ten per cent interest; but that payment could not be enforced by execution till after ten months from the date of the

cognovit. As the judgment below authorizes execution at once, it is ordered that the judgment below be modified in that particular, and in all other respects affirmed.

Judgment modified.

Wright & Knapp, for plaintiff in error.

A. Hall and *J. H. Cowles*, for defendant.

DAVIS *v.* JEWETT.

A mortgagor, after the mortgage become due, in consideration of further time, entered into an engagement to pay the mortgagee the additional sum of four per cent interest on the balance due; held that such new engagement did not become a part of the mortgage, and should not be included in the decree of foreclosure.

APPEAL *from Van Buren District Court.*

Opinion by GREENE, J. Bill to foreclose a mortgage, filed by Jewitt against Davis. A decree was rendered by default against the defendant, for the amount due on the mortgage, and also for four per cent additional. This four per cent was included in the decree by virtue of an agreement, dated at St. Louis, August 9th, 1849, in the following words:

"Whereas, E. L. Jewitt holds two certain promisory notes against me, each for seven hundred and twenty-five dollars, dated February 24th, 1847, and both secured by mortgage on which some payments have been made. Now, therefore, I do hereby agree to pay the sum of four per cent interest on the balance due on said notes until paid, in addi-

tion to the six per cent therein named, provided these presents are in no way to interfere with the present relation between those notes and the mortgage.

WILLIAM DAVIS."

It is now objected that the four per cent stipulated in this agreement, should not be included in the decree. We are clearly of the opinion that this agreement should not be considered as a part of the mortgage, and that the increased indebtedness created by it, could not operate as a lien upon the land described in the mortgage. It had none of the properties of a mortgage, nor could it have been intended as an appendage to that instrument to change its conditions, or increase the amount. It was made with the understanding that "it should not interfere with the relation between the notes and the mortgage." It must be considered a separate undertaking on the part of Davis, made upon the consideration of time and indulgence given him on the mortgage, and as such, it can be enforced at law, without the interposition of chancery. As this new undertaking was in no way incorporated in the mortgage, it should not have been included in the decree of foreclosure. It is therefore reversed, and a decree will be rendered in this court for the amount now due on the notes, with interest.

Decree reversed.

A. Hall, for appellant.

Geo. G. Wright, for appellee.

Bonnon's Estate *v.* Urton.

In default of payment in land for services rendered, the party may recover the value of what he was to receive.

Where services performed were to be paid for in land, the party may recover, though the contract was not in writing.

In a suit against an estate where the pleadings do not show that the liability was joint, nor that there was a surviving partner, nor even an effort to have the co-debtor made a party, the plaintiff may recover if his claim is proved.

Error *to Jefferson District Court.*

Opinion by Greene, J. Urton filed his claim before the probate court against the estate of O. Bonnon, and recovered judgment for $200. Defendant appealed to the district court, where the plaintiff recovered a verdict and judgment for $30. The defendant brings the case to this court and objects to some of the instructions given to the jury:

1. The court instructed the jury in substance, that if the parties agreed in advance for a certain tract of land in payment, and if the plaintiff performed his part of the contract, and received nothing in payment for his services, he should recover the worth of what he should have had. Objections are urged to this instruction, still, we can discover nothing in it calculated to mislead a jury. It seems applicable to the case, and as a legal proposition, we think it well founded. If the plaintiff worked for a particular object, and performed the work according to contract, he was surely entitled to the object or its value. Law, justice, and common honesty unite in support of this proposition.

2. But it is again objected that the court instructed the jury that if the payment "was to be in land, the plaintiff may still recover, though the contract was *not* in writing."

Authorities are adduced to show that a mere verbal contract for land is not binding. It is hardly necessary to say that these authorities are not applicable to the case and instructions before us. Here the instruction assumes that, if the work was performed in payment of the land, the plaintiff might recover. As the land was paid for by the work performed, if the defendant failed to make payment in the land, clearly the plaintiff was entitled to recover the value of the land at the time payment should have been made, with interest, although the contract was not in writing.

3. It was objected in the court below, and the objection is urged in this court, that O. Bonnon and his brother, are jointly liable, and that the suit cannot be sustained against one alone. It is claimed that both were benefited by the services rendered, that both were liable, and that therefore both should be sued. If both were liable, it necessarily follows that each one was liable; the plaintiff might sue one or both. If one is sued alone, and he goes to trial without having his co-debtor brought into court, he cannot, thus escape his liability.

At common law, such a joint liability could only be sustained against the surviving debtor. But this doctrine is not consistent with the statutes of this state. But if the doctrine was applicable to this state, it could not be enforced in this case because there is nothing in the pleadings or proceedings, to show that the liability was against joint parties, or that there was a survivor.

We conclude then that the proceedings below are not erroneous.

Judgment affirmed.

C. Negus, for plaintiff in error.

C. Baldwin, for defendant.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

FORT DES MOINE, NOVEMBER TERM, A. D. 1851.

In the fifth year of the State.

PRESENT:

HON. JOSEPH WILLIAMS, CHIEF JUSTICE.
" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

HOLLAND *v.* VANARD.

A note promising a payment of seventy-five dollars "on or before the fifteenth of April next," with a condition, "if paid by the first of April fifty dollars shall discharge the note;" held that an endorsement of fifty-five dollars and fifty cents on the ninth of April did not satisfy the note. The failure to pay by the time stipulated, made the penalty binding, and added that amount to the indebtedness.

APPEAL *from Polk District Court.*

Opinion by GREENE, J. Assumpsit before a justice of the peace by Holland against Vanard, on a promissory note. Judgment for the plaintiff.

Appeal to district court by defendant. Cause submitted to the judge without a jury, by agreement, and judgment rendered against the plaintiff who has appealed to this court.

The only question involved, is the construction of the note, upon which, suit is brought. It is in these words:

"On or before the fifteenth of April next, for value received, I promise to pay G. Holland seventy-five dollars; and if paid by the first of April, fifty dollars shall discharge this note. M. VANARD.

Fort Des Moines, Jan'y 5th, 1851."

Upon the back of the note the following payment was endorsed: "Received on the within note, fifty-five dollars and fifty cents, this 9th day of April, 1851." Evidence was admitted in relation to the transaction, but nothing to show any additional payment or any other intention of the parties than that expressed in the note. The court, therefore, decided that the payment of fifty-five dollars and fifty cents on the 9th of April, amounted to a satisfaction of the note. This decision we consider erroneous, and not agreeable to the expressed intention of the parties. Had the defendant availed himself of the condition of paying fifty dollars by the first of April, the note would have been satisfied, but as the note was not paid by that time, the plaintiff was entitled to the additional twenty-five dollars, as a stipulated penalty for non-payment. The promise to pay seventy-five dollars on or before the fifteenth day of April, became absolute as a debt increased by the agreed penalty, after the first of April. This is clearly indicated by the language of the note, and appears to have been the understanding of the parties when the payment of fifty-five dollars and fifty cents was endorsed upon the note. If that was intended by the defendants as a full payment, why was it endorsed upon the note? Why was the note left with

the plaintiff? Why was it not taken up and cancelled? It appears by the evidence embodied in the bill of exceptions, that on the third day of April, the plaintiff agreed with the defendant to accept an order for the fifty-five dollars and fifty cents, to be credited on the note, and the order was accordingly presented to the plaintiff and credited on the 9th of April. The order does not appear to have been either given or accepted as a discharge, but merely as a part payment to be credited on the note. The circumstances under which order was applied upon the note, and the language of that endorsement, and the fact that the note was left with the plaintiff, all unite in showing that the defendant still considered himself indebted to the plaintiff on the note. But no doubt can be entertained as to the intentions of the parties as expressed in that instrument. It is free from ambiguity, and explicitly declares the intention of the parties; and as no want or failure of consideration is indicated by the evidence, we conclude that the court placed an erroneous construction upon the note, and should have rendered judgment against defendant for the balance due.

Judgment reversed.

P. M. Casady and *R. S. Tidrick*, for appellant.

J. M. Perry and *C. Bates*, for appellee.

TRIMBLE *v.* SHAFFER, *et. al.*

When witnesses testified that they sold the claim to plaintiff, and it appearing on cross-examination, that they conveyed by quit claim deed, the refusal of the court to rule out the oral testimony in relation to the claim, was not error.

Where it is proved that the boundaries of a claim have been once marked out according to law, the claimant need not show that the lines were kept fresh.

APPEAL *from Appanoose District Court.*

Opinion by KINNEY, J. This was an action of trespass, brought against Trimble by Shaffer & Bickford before a justice of the peace, for cutting timber. Trial by jury, and verdict of guilty, and damages assessed at two dollars. Defendant appealed to the dictrict court; judgment in district court for ten dollars in favor of the plaintiffs.

By the bill of exceptions, it appears that the plaintiff introduced Stratton and Boak, who swore that they sold to plaintiffs the claim on which the trespass was committed. On their cross-examination they swore that the sale was made in writing by a quit claim deed; whereupon the defendant moved the court to rule out the testimony in relation to the sale, which the court refused to do. This is one error assigned. We think the court ruled correctly. They state a particular fact, to-wit: That the sale was made in writing. It would have been manifestly improper to have received testimony in relation to the contents of the deed, as the deed was the highest and best evidence, and oral testimony could not have been received of what it contained; but witnesses might with great propriety state that a deed had been given, and this was proper testimony to go to the jury. It then might well become a question whether the plaintiffs could recover without producing the evidence of their title, but that question is not raised or saved by the

bill of exceptions, and therefore does not belong to the case. In this ruling therefore we see no error.

But it is contended that the court erred in instructing the jury that it was sufficient if the plaintiffs once marked out their claims so that their boundaries could be easily traced and the extent of said claims easily known, and that it was not incumbent upon the plaintiffs to keep their lines fresh. And that if the claim had once been made according to law and the custom of the neighborhood, it was all that was required. By an act entitled an "Act to prevent trespass, and other injuries being done to the possessions of settlers on the public domains," &c., the first section provides, that such claims shall be marked out so that the boundaries thereof can be readily traced and the extent of said claim easily known. Rev. Stat., 457.

If this had not been done by the plaintiffs in this case, it would have been a good defence to the action. But it appears by the record that the claim had been marked according to law, and upon this the instruction was based. One legal survey was sufficient. In this there is no error.

Judgment affirmed.

Curtis Bates and *J. M. Perry*, for appellant.

W. H. Brumfield, for appellees.

Perkins v. Davis.

Where a default is set aside on affidavit of merits, and the defendant thereupon files a demurrer as well as an answer, it is not error under the code, to reject the demurrer.

Appeal *from Polk District Court.*

Opinion by Williams, C. J. In this case, when the cause was reached in order, the defendant, Kerving, failed to plead to the plaintiff's action. Judgment by default was entered against him. During the term, and on the sixth day thereof, the defendant filed his motion with an affidavit of merits, to take off the default and open the judgment, whereupon the default was removed and the judgment set aside. The bill of exceptions, taken at the time shows that the default being set aside and the judgment opened, thereupon the defendant offered an answer to the merits of the petition of said plaintiff, and also a demurrer to said petition, claiming as his right to answer or demur, as if default had not been entered. "That thereupon" the court ruled that the defendant be not allowed to demur to the plaintiff's petition, but that he be required to answer to the merits only. To this ruling of the court, the defendant excepted. The only question presented for decision here by the assignment of error, is, as to the ruling of the district court, in refusing to allow the defendant to demur and requiring him to plead to the merits of the case, as presented by the complaint of the plaintiff.

The petition of the plaintiff presents a good and substantial cause of action against the defendant. The defendant suffered judgment to be entered against him by default; at a late day of the term, he filed his affidavit of defence on the merits, in consideration of which the plaintiff's judgment, which had been obtained legally, by virtue of the

rules of practice in the district court, was set aside, and he was suffered to come in, and by pleading issuably to make his defence on the merits.

It is provided in the code, that default may be set aside on such terms as the court may deem just, but not unless an affidavit of merits be filed and a reasonable excuse be shown for having made such default. Code 262, § 1827.

The statute clearly confers a discretionary power on the court, as to the terms on which the default might be set aside, and the defendant allowed to make his defence on the merits. The exercise of this power is sanctioned, also, by general and long usage in jurisprudence. Where a discretionary power, so clearly consonant to the principles of equity, is reasonably exercised, so as not to operate oppressively upon the rights of a party, courts possessing the controlling jurisdiction of revision will not interfere to disturb the adjudication. To allow the defendant, after default and judgment, to come in and contest the plaintiff's right to recover by filing dilatory pleas, or mere formal objections, founded in legal technicalities which did not effect meritoriously the facts, of which the plaintiff's cause of action consisted, would be a violation of the spirit and intent of the statute, and long established practice. Such indulgence would tend to annoyance in the transaction of the business of the court, the subversion of the rights of the plaintiff, and prevent the design of a judgment by default.

On the trial here, it was urged that the terms were not expressly imposed before the default was taken off and the judgment opened, and not until the demurrer was filed. That it was the duty of the court to announce the terms of opening the judgment before the party was permitted to offer his pleadings in defence of the action, so that he might elect to accept the terms and enter upon his defence, or let the judgment remain; we cannot see the force of this allegation. This he could do as well upon the filing of his pleas, as before he was suffered to make his defence. The

effect of the proceeding on his rights would be the same. But the record shows that the default being set aside, "thereupon" the demurrer and answer of the defendant were filed, and that "*thereupon*," the court ruled that he should not be allowed to demur. This being the statement of the proceeding, we consider that no substantial grievance was suffered by the defendant by reason of the action of the court, by which he was surprised and deprived of any of his legal rights. As the case stood, he was allowed to make his defence fully, so far as he could plead by answering to the facts upon which the plaintiff's cause of action rested. This was all he had a right to do, in accordance with the rules of practice authorized by the statute, and uniformly recognized by the courts.

Judgment affirmed.

C. B. Darwin, for appellant.

Perry & Bates, for appellee.

ELLIOTT *v.* MITCHELL.

Where the grounds of error, alleged in an affidavit for a *certiorari*, are palpably insufficient, and show no error before the justice, the writ of *certiorari* may be dismissed, on motion, in the district court.

Any defect in an attachment affidavit or bond can only affect the attachment proceeding, and not the suit, or action upon which the attachment issued.

APPEAL *from Polk District Court.*

Opinion by GREENE, J. Assumpsit and attachment commenced by Thomas Mitchell against W. Elliot, before a

justice of the peace. Judgment for the plaintiff. Defendant took the case to the district court by writ of *certiorari*. The affidavit upon which the *certiorari* was issued, alleged as error in the proceedings of the justice, that he refused to dismiss the suit, on the ground of defects in the affidavit and bond for the writ of attachment. In the district court, defendant moved to dismiss the writ of *certiorari* for reasons alleged, and this motion was sustained. The third reason assigned, and the only one necessary to be considered, is, that the errors alleged in the attachment affidavit are insufficient to authorize the issuing of the writ of *certiorari*.

It is argued by counsel for the appellant that if the affidavit for a *certiorari* is filed within the time and with the statements required by the statute, the writ should issue as a writ of right, and hence it is claimed that the writ should not have been dismissed. But we are of the opinion that where the grounds of error alleged in the affidavit are palpably insufficient and do not show error before the justice that the *certiorari* may properly be dismissed by the district court on a motion made *before* the hearing of the cause. This view is not in conflict with the statute which authorizes the district court, *after* hearing the case, to give judgment as the right of the matter may appear, or to affirm or reverse the judgment in whole or in part. Rev. ..... 337, § 5.

Where the affidavit does not show *prima facie* some ground of error, where it does not contain some averment that would justify a change in the judgment of the justice, there can be no necessity or propriety in bringing the case to a formal hearing. In such a case the certiorari would be without foundation and should be disposed of in the most summary manner, consistent with the rights of the parties, the ends of justice, and the rules of law.

But it is urged that the affidavit in the case at bar, contains averments of error which would justify the court in

hearing the certiorari proceedings, and in reversing the judgment of the justice. The affidavit alleges only that the justice refused to dismiss the suit for defects in the attachment affidavit and bond. Those defects, if material, would justify the justice in dissolving the attachment, but they could be no ground for dismissing the suit. Such defects in the attachment proceeding could not impair the plaintiff's cause of action or defeat his right to recover against the defendant; they could only affect his attachment lien upon defendant's property. The attachment, and the suit are distinct matters, and any error or irregularity in the former cannot affect the latter. The suit should be tried and determined upon its own merits, without any regard to the attachment, and so far as we can judge by the record before us, this suit was so decided by the justice. As the certiorari affidavit alleges no error in the trial or decision of the suit, we think the writ was correctly dismissed.

Judgment affirmed.

J. M. Perry and *C. Bates*, for appellant.

J. M. Barnard, for appellee.

EVERLY *v.* COLE, *et. al.*

Where a party plaintiff was called upon to testify in relation to a certain fact in behalf of defendant, plaintiff's attorney has no right to cross-examine him in relation to other matters.

APPEAL *from Polk District Court.*

Opinion by KINNEY, J. Cole Lyon & Co., sued Everly in assumpsit and declared on the common counts.

The defendant pleaded the general issue, and gave notice of set off. It appers from the bill of exceptions, that on the trial, the defendant having failed to prove certain facts—in relation to the sale of a certain promisory note, by said plaintiffs below to the defendant—called L. D. Winchester, one of the plaintiffs, who was examined as a witness in relation to the sale of said note exclusively, and not in relation to any other matter connected with the plaintiff's demand or the defendant's defence. After said examination in relation to said note, the attorney for plaintiff offered to prove by said Winchester, certain facts in relation to the claim and account of the plaintiffs. This was objected to, but the objection was overruled by the court, and the witness was permitted to testify in chief in relation to the account of the plaintiffs, the same as though he were not a party. We think the court erred in overruling the objection. Winchester was a party plaintiff; he was called by the defendant to testify in relation to a particular item or fact; the plaintiff had the right to cross-examine upon all the facts elicited by the testimony, but as he was not called to testify indiscriminately upon the issue joioned, but only in relation to an isolated point, the plaintiff could not, when introduced for that purpose alone, become witness for himself to give testimony in support of his own claim or demand.

We have come to this conclusion by the section of the statute authorizing one party to call upon an opposite party to testify. Rev. Stat. 262, § 3, provides, that the court shall, upon the application of the party offering a demand

or set off, order the opposite party, or any person of such party, to be sworn in relation thereto. By virtue of this statute, Everly, the defendant, called Winchester, one of the plaintiffs, to testify about the sale of a note from the plaintiffs to him; alleging at the same time, that he was called for this purpose and no other. His testimony should only have been in relation thereto, and hence it was improper to permit him to give testimony upon any other matter than that for which he was called by the defendant.

The court having erred in overruling the objections of the defendant's counsel, the judgment is reversed, and the cause remanded for further proceedings.

Judgment reversed.

C. Bates and *J. M. Perry*, for appellant.

Casady and *Tidrick*, for appellees.

COFFEEN *v.* HAMMOND.

The sworn certificate of a judge and clerk admitted to show certain items in an amended transcript which was lost, in order to show that the adjudication thereon was correct.

APPEAL *from Polk District Court.*

Opinion by WILLIAMS, C. J. George Hammond brought suit against Benjamin Coffeen, before a justice of the peace, in assumpsit. The parties appeared, trial was had, and the plaintiff recovered by the verdict of a jury, the sum of forty-one dollars and costs, for which judgment was entered. The cause was taken by the certiorari to the district court

of Polk county. The cause was called for trial at the April term, 1851. The record shows that on the trial before the justice the defendant failed to present and file his items of set-off to the plaintiff's demand, until after the jury had been sworn to try the issue. That after the examination of the plaintiff's witnesses had been closed, he then offered to prove his items of set off, to which plaintiff objected, and the objection was sustained by the justice, on the ground that he had not complied with the statute, which requires the defendant to file with the justice his set-off before the jury is sworn.

When the cause was called for trial on the certiorari in the district court, the transcript of the proceedings before the justice as certified by him, showed that the defendant had offered to prove, in defence to the plaintiff's action, "set-off and payment," and that his evidence therefore was ruled out by the justice. A rule to perfect the record as returned by the justice, was prayed for on the part of Hammond, the plaintiff below, and granted. Upon the return of the rule, the justice sent up an amended transcript, duly certified, by which it appeared that he was mistaken in his first transcript in stating therein that the defendant, Coffeen, had offered to prove "set-off and *payment*," that in truth, he had only offered to prove items of set-off; that the mistake occurred because the justice did not know the difference in law between set-off and payment. The record being thus amended, the proceedings of the justice were affirmed by the district court. The cause is here by appeal.

On the trial here the record again proved to be deficient. The record of the justice, as amended, and upon which the decision was made in the district court, was proved to be lost, and the case came to this court as originally certified by the justice. On motion of the counsel of Hammond, the appellee, a rule was presented and served on the clerk of the district court, to send up the whole record of the case. In answer to this rule the clerk certified and proved

by his oath that the amended transcript of the justice, as above stated, had been duly filed of record in the district court. That it was that which formed the basis of the trial and decision of the case on the certiorari in the district court; that he had searched diligently and carefully for it in the office of the clerk of the district court, and that it could not be found. This statement under oath is also accompanied by the certificate, under oath, of William McCay, the judge of the district court, who tried the cause in that court, and who is still the acting judge of the district, of which Polk county is a part, by which he certifies that the amended transcript of the justices proceedings was on file in the district court, and that it formed the basis of the decision of the court, as being the true and proper transcript of the justice. This being the state of the case as presented here, the attorney for the appellant objected to the reception of the certificate of the judge and clerk, as made under oath, and insisted on the trial of the cause upon the original transcript of the justice, by which it is made to appear that the defendant, on the trial before the justice, had offered to prove "*payment and set-off.*" As the success of the appellant, in reversing the judgment of the district court, depends entirely upon the acceptance and allowance of this evidence to supply the loss of the amended transcript, this is the only question for decision in this case. We confess that this case is rather anomalorous. That the most, nay only, important part of the record, so far as the point at issue is concerned, is not to be found among the papers of the case, is indeed singular. We have been unable to find in the books here any case which might serve as a precedent for our action. The object of a record is to obviate the necessity of reliance on the memory of man, which would tend to confusion and uncertainty in the adjustment of the rights of parties litigant. However, the great design of the law, is the ascertainment of right. If the loss of a paper of record could not be proven, and the

next best evidence of its existence and contents could not be given, it is clear that gross injustice might be the consequence. We therefore feel constrained to resort to the same rule which prevails by well established practice to supply evidence in the case of a lost deed or other instrument of writing, when its existence and loss have been established. Being satisfied that the transcript, as amended, was duly filed in the case, and that the adjudication of the district court was properly had thereon, and that the defendant did not present his set-off in time as required by the statute; also, that he did not offer to prove payment, we are of the opinion that there is no error in the judgment of the district court.

Judgment affirmed.

J. E. Jewitt, for appellant.

M. Young, for appellee.

Feller *v.* Winchester.

Where an answer is not sufficiently explicit and responsive, an amended answer may be required.

Appeal *from Polk District Court.*

Opinion by Greene, J. Bill in chancery, filed by Winchester, as administrator of Hager, against Feller, charging him with having obtained from Hager, when in a state of derangement and insanity the cancellation of a note for one hundred dollars and a receipt against money due from Feller to Hager, without having paid the money due on the

note or account against which the receipt was given. In the bill, the defendant is called upon to answer explicitly among other things, whether he paid anything on said note and account, and if so, the exact amount. In the answer the defendant alleges full payment of the amount due to Hager, but does not state the amount he paid. Exceptions were taken to the answer in this particular, and sustained by the court. To this ruling of the court, the defendant has appealed. We consider the answer too general, and not sufficiently responsive to the bill. It should fully and particularly state the sum paid by defendant to Hager in his lifetime, in satisfaction of his demands. The amount thus paid would necessarily have an important bearing upon the decree, and could not perhaps be ascertained from any other witness. It was besides material to prove or disprove the equity of the bill, by showing the character of the payment. The order of the court requiring defendant to file an amended answer is therefore affirmed.

Order affirmed.

J. E. Jewitt, for appellant.

Casady and *Tidrick*, for appellee.

STUMP *v.* BUZICK.

A bill for an injunction should be verified by affidavit.

APPEAL *to Polk District Court.*

Opinion by KINNEY, J. Buzick filed his bill against Stump, praying for a writ of injunction against him and

Thomas A. Napier, sheriff, to restrain them from the collection of a judgment at law in favor of said Stump, upon which an execution had issued, and the property of said Buzick levied upon to satisfy said judgment. The writ having been allowed, the defendant moved the court to dissolve the injunction, because the bill was not sworn to at the time the injunction was granted. This motion was overruled; whereupon, the defendant filed his exceptions. This was error. The bill should have been verified by affidavit, before the application for injunction could have been granted. This question was decided by the Territorial supreme court, in the case of *Porter* v. *Brazelton* and *Moffit*, Morris Rep. 108, and requires no additional argument in support of the decision made in that case. The ruling of the court in refusing to dissolve the injunction upon the motion filed, is, therefore, reversed.

Casady and *Tidrick*, for appellant.

J. E. Jewitt, for appellee.

Napier *v.* Wiseman.

The supreme court will not disturb matters of fact decided by the court below, when the bill of exceptions does not purport to give all the evidence.

Damages may be recovered against a sheriff for an illegal sale of land, if the plaintiff was deprived of his title by such sale.

Appeal *from Polk District Court.*

Opinion by Greene, J. This case was commenced under the New Code by Henson Wiseman against Thomas H.

Napier. The petition claims damages from the defendant, for selling on execution, as sheriff of Polk county, the plaintiff's equitable right to lot seven, in block thirty-seven, in the town of Fort Des Moines, without making any levy or giving any notice whatever of the sales. The answer in brief and general terms denied the trespass; and denied that anything was due the plaintiff. The parties submitted the case to the court without a jury. The judge found that Napier, by his deputy, did sell the lot in question, without giving notice that the plaintiff had an equitable interest in the lot; that the sheriff gave a certificate of sale to Thomas McMullen, who, by virtue of said certificate, procured a deed for said lot from the board of commissioners of Polk county, who held the legal title; and, that the plaintiff was damaged seventy-five dollars by the trespass and illegal sale. Judgment was rendered accordingly.

To the decision of this cause several errors are assigned, but the record disclosed no question of law, decided by the court below, which can be properly reversed by this court. The whole transaction resolves itself into questions of fact, which appear to have been decided upon evidence before the court. That evidence is not all before us; there was no exception taken to it; and there is nothing to show that the conclusions of the court were not authorized by law.

It is contended that if the sale was illegal, that McMullen acquired no right from it, and that, therefore, the plaintiff could not be injured by the sale. But the evidence satisfied the court below that he had been damaged to the amount of seventy-five dollars. And it appears by the record that the certificate from the sheriff, which *prima facie*, gave McMullen the plaintiff's equity in the lot, induced the county commissioners to deed the legal title to McMullen, and thus the illegal acts of the sheriff precluded the plaintiff from obtaining that title. It follows then, that the plaintiff suffered damage from the unauthorized proceedings

of the sheriff. In the present state of the record we see no alternative but to affirm the judgment below.

Judgment affirmed.

Casady and *Tidrick*, for appellant.

M. Young, for appellee.

HUSTON *v.* HUSTON.

A certified transcript of the record—and not the original papers—should be sent to the supreme court, on appeal.

APPEAL *from Dallas District Court.*

Opinion by GREENE, J. A motion is made in this case to dismiss the appeal, because there is no certified transcript of the record.

The clerk of the district court has sent nothing more than the original papers to this court, without any record, transcript or certificate of the proceedings below. He has not even certified to us the rulings, orders or judgment of the court. There is nothing upon which we can entertain jurisdiction; nothing upon which we can even infer any prior judicial action, from which an appeal was taken. It appears that the clerks attention was never directed to any regulation in relation to appeals. As no provision of the Code, §§ 1973–1978, in relation to appeals, appears to have been observed by the clerk or the appellant, as there is in fact no transcript of the record or subject matter over which we can exercise jurisdiction, the case must be dismissed.

Motion granted.

Perry and *Bates*, for the motion.

B. Granger and *M. Young*, against.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

IOWA CITY, JUNE TERM, A. D. 1851.

In the fifth year of the State.

PRESENT:

HON. JOSEPH WILLIAMS, CHIEF JUSTICE.
" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

The State *v.* Glover & Nevin.

An indictment found should be presented in open court, in presence of the grand jury, and the fact should be certified of record.

Parole testimony of a clerk or his deputy not admissible to supply matter which should appear of record.

Error *to Linn District Court.*

Opinion by Williams, C. J. At the March term of the district court for Linn county, Joshua Glover was called to answer to an indictment for gaming. At the same term, he and one, John Nevin, were also charged by indictment with selling spirituous liquor without license, in violation of the

Statute. When the causes were called for trial the defendants moved to quash the indictments in each case, for the reason that there was no indorsement or other proper and legal evidence that they were found, and "exhibited in open court, *in the presence of the grand jury*," and filed of record, as required by the statute, in such cases made and provided. By the bill of exceptions, it appears that indorsements had been made on the back of the indictments as follows, viz: "Exhibited in open court, in the presence of the grand jury, and filed this 11th day of September, A. D., 1850." But it also appears that this indorsement was not made by Hosea W. Gray, who was the clerk of the district court of Linn county, at the term of said district court when the indictments purport to have been found and presented. The signature of James M. Berry, clerk, as it appears, by said indorsements, was signed only a few days before the term of the court next succeeding that when the indictments purport to have been found. That the said James M. Berry was not appointed to the office of clerk of the said district court, until after the adjournment of the court for the term at which the indictments purport to have been found and presented; and that the signature of said "James M. Berry, clerk," was attached to said indorsement without any express order of said court.

This being the state of the case as to the making of the indorsements, the prosecuting attorney for the county, thereupon, moved the court to allow Hosea W. Gray, who was then in court, and who had been the clerk at the time the indictments purport to have been found and presented, but who was not, at the time of the making of this motion, the clerk, to amend by signing his name officially to said indorsements, and to strike out the name of James M. Berry, who had signed them as clerk, or to allow the said James M. Berry to sign the name of Hosea W. Gray as principal of him, the said James M. Berry, at the time said indorsements were made; that the name of James M. Berry was

there by mistake; and also, to prove by said Hosea W. Gray, that he had omitted in the hurry of business at the September term, when said indictments purport to have been found and presented, to sign his name to the fiat, as indorsed on said indictments. The prosecutor also offered also to prove by Hosea W. Gray and James M. Berry, that said indictments were presented [illegible] in the presence of the grand jury, at said September term, 1850; and at that time said Gray was acting as clerk, and said Berry as deputy and assistant clerk of said court; that said Berry did act as deputy clerk at said term [illegible], and did make the indorsements on the said bills, and almost instantaneously with the presentment of said indictments, omitting the signature and leaving the same to be signed by said Hosea W. Gray, who was then [illegible] the said Gray omitted to do. That on the [illegible] September, after the adjournment of said court, said Berry retired from the office of clerk of the court, and said Berry, who had been elected was qualified and assumed the duties of that office; that said Berry had ever since performed the duties of clerk, and still officiated as such; that said indictment had been arranged in a bundle with other indictments, and remained in that condition as papers of said office with said indorsement thereon, but without the signature of the time said indorsement was made until the motion to quash was made and said evidence offered. And said prosecutor offered to submit to such terms as the court might impose, if such amendment were to be allowed, and that the defendants might have until the next term thereafter to plead. The court refused to admit the testimony as offered, or any part thereof; and refused also to permit the amendments or either of them to be made, and sustained the motion to quash. To this ruling of the court the prosecutor for the county excepted.

In this matter, it is contended that the court erred: and therefore a reversal of the judgment is claimed. Two

questions are here presented for the consideration of this court:

1st. Is it indispensably necessary, in law, that the indictments should be, when found, presented in open court in the presence of the grand jury, and that the fact should be judicially and officially certified of record?

2d. If so, upon the failure of the court, so to certify the facts during the term, is parole testimony allowable to supply the omission, or cure the failure, and can the record be amended after the expiration of the term when the indictments purport to have been found and presented?

The first question is directly answered and disposed of by the statute. The legislature of this state have deemed it proper to prescribe the duties of courts and juries in proceedings of a criminal nature, in order that uniform security and protection may be given to persons accused of crime. The legislature have enacted that "indictments found by a grand jury shall be presented to the court *in the presence* of said jury, shall be filed and remain as public record." Rev. Stat. p. 152, § 34. This enactment is positive in its terms. Its requirement is, that it shall be presented to the court in presence of the grand jury. The propriety of such a provision, in view of the rights of the accused is obvious. It is enough, however, that it is so enacted; its observance is a duty not to be questioned; courts will enforce it. The manner in which the fact of presentation of the indictment in open court in the presence of the grand jury should be made to appear, is not specifically prescribed by the statute; that is left for the action of the court, in accordance with the proper and usual procedure of judicial tribunals in making and preserving matters of record. That the legislature intended to make such presentation a matter of record, cannot, we think, be doubted. The fact should appear of record, then, affirmatively. In view of the statute, it is as necessary that this should be made a matter of record as a verdict of a jury, in the judgment of the

court. In the case of *Rainey* v. *The People*, 3 Gilman's R. 72, the court decided that, "the only mode of preferring an indictment is through the medium of the grand jury. It is the imperative duty of the grand jury to make the presentment in open court. The indictment is the foundation of all the subsequent proceedings in the cause; and to uphold them, the record ought to show affirmatively the returning of the indictment into court, by the grand jury." In the case of *Gardner* v. *The People*, 3 Scam. 83, it is decided that the indorsement and signature of the foreman are the evidence of the finding of the grand jury, without which, the court should never permit the indictment to be entered of record as a true bill." *McKinney* v. *The People*, 2 Gilman, 540. The statute of Illinois requires that the indictment, when found, shall be indorsed "a true bill," and that this indorsement shall be signed by the foreman, officially. Is that requirement any more imperative than that of the statute, that "the indictment shall be presented to the court in the presence of the grand jury, shall be filed, and remain as a public record?" We think not. The legislature certainly intended that the finding, presentation in the presence of the grand jury, and filing of the indictment should be certified by the record of the court. These acts each, should appear affirmatively of record. If one might be dispensed with, so might the other. That the presentation to the court, *in the presence of the grand jury*, is as indispensable as the finding or the filing, is clear from the terms of the statute; we think it would not be contended that the two latter requirements need not be complied with. Where a statute plainly and positively in express terms enjoins the performance of a duty like this, the omission of it is fatal to the proceeding. Without it the indictment was not legitimately in possession of the court, for the exercise of its jurisdiction. In the case of *Young* v. *Duggan*, 1 G. Greene's R., 152, this court decided that, where the clerk of the district court had omitted to indorse an award of

arbitrators, so as to fix the day on which it was returned and filed in the clerks office, the oath of the arbitrator who handed it to the clerk in his office, was competent evidence to show that the return was made in time, and that the court would presume that the proceedings were regular in the absence of evidence to the contrary; that the record having been delivered to the clerk, in his office, within the time prescribed by law, the omission of the clerk to indorse it as filed did not vitiate the proceeding. In this case the duty enjoined, was merely clerical, so far as the indorsement by the clerk was concerned. The return of the record within the time prescribed by law, was the essential matter to be ascertained; and to establish which, the evidence of the arbitrator was received. In this case of the award the proceeding was civil in its nature. The case at bar is one of criminal jurisprudence. The duty enjoined by the statute, and which was omitted, appertains to the court, in term time for its solemn recognition and action, under its own supervision. It becomes matter of record by the fact of the court itself. Such is the difference between these cases. The duties enjoined by a criminal statute are more rigidly enforced than those of a civil nature. We are of the opinion that the omission to make the record required by the statute, of the fact, that the indictments were "presented into court *in the presence of the grand jury*" is fatal to the proceeding. This seems to have been granted by the counsel for the prosecution as proposed in the court below, to cure the defect by the parole testimony of the clerk of the court and his deputy, who officiated at the term of the court when the indictments purport to have been found. On this subject, whilst we must admire the ardor and ingenuity with which this proposition has been urged, we have only to say, that it is not allowable, in a criminal proceeding under the statute, to adopt so loose and unsafe a practice. The design of the statute is to guard and protect the rights of persons who stand accused of offences. To allow

the record to be supplied, or made up six months after the court had been adjourned and the grand jury dispersed, by a person who had been clerk, but whose term of office had expired, or by his deputy, or the successor of the clerk who officiated at the term when the act should have been done, would, we think, be fraught with danger to parties defendant in criminal cases, in violation of the express and imperative injunction of the statute. We are unwilling that such a precedent shall be furnished for the future action of the courts. The ruling of the court below, rejecting the parole testimony to supply the record, refusing to permit the amendment to be made, and quashing the indictments, was correct.

Judgment affirmed.

Wm. Smyth, for the State.

J. M. Preston, for defendants.

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AMENT *v.* HUMPHREY.

A. resided in school district No. 1, and had his store in district No. 2, held that his personal property in No. 2 was not liable for his school tax in No. 1.

The thirteenth section of the Revenue Law of 1844, is not repealed by the Revenue Law of 1847.

A subsequent law upon the same subject matter does not necessarily repeal the antecedent law; unless the former is expressly repealed or superceded, both should be enforced as far as possible without conflict.

ERROR *to District Court of Muscatine County.*

Opinion by KINNEY, J. This was an action of replevin brought by Ament against Humphrey, before a justice of the peace. Judgment for the plaintiff. Defendant appealed, and in the district court the following facts were agreed upon by the parties as presenting the question which they desired to have settled:

"The town of Bloomington was originally divided into two school districts, being divided by Sycamore street, that part of the town lying easterly of that street being district No. 1, and that part lying westerly of said street being district No. 2, and both said districts now remaining as districts No. 1 and 2, in Bloomington township, in Muscatine county. The town of Bloomington has since been named Muscatine. Both districts are taken as legally organized; both districts in the year 1850, legally levied a school house tax. The plaintiff, Ament, is a resident in district No. 1, and is a married man, and a householder and freeholder in said district. He owns no real estate in district No. 2, but in that district carries on the business of a tin and sheet iron worker, and has in that business a considerable stock in trade.

The defendant, Humphrey, is the secretary of school district No. 1, and as such, under the tax list of said district legally made, took the property in question, for the payment of the said tax, against said Ament, which had been refused. It is agreed that this tax list, as taken from the assessment roll of the county, embraces the aforesaid stock in trade of Ament, used in district No 2; also, that said Ament is taxed for the same property in district No. 2, as taken from the county assessment roll.

"The assessment roll and tax list of the county, and the tax lists of the above two districts, as produced by the

parties on trial, are agreed upon as evidence. The ordinary map or plat of the town of Bloomington or Muscatine is sufficient evidence for the purpose of this trial."

The case was submitted to the court on this agreed state of facts, whereupon, the court found the right of possession in and to the property replevied, in said Ansel Humphreys, and rendered judgment for nominal damages against the said Ament. Ament brings the case to this court on writ of error, and assigns for error the decision of the court. The facts, as agreed upon in the court below, by consent, are treated as a part of the record in this court.

The facts presented by the record are simply these: Ament resided in school district No. 1; he carried on the tin and sheet iron business in school district No. 2. Humphreys, as the secretary of school district No. 1, took the property in question for the payment of school house tax for that district, which was levied on the personal property of Ament in school district No. 2. Ament replevied the property, and the court decided the right of possession to be in Humphreys, thereby deciding that the personal property in District No. 2 was liable to be taxed for school house purposes in district No. 1; that being the district in which Ament resided. In this we think the court erred. Believing as we do, that the statute settles this question, we deem it unnecessary to go into an extended examination of the common law doctrine, that personal property has no locality, and follows the person. As a general rule, this is true, and without statute it would be subject to, and be governed by, the law of the domicil. Police and municipal regulations, however, would form an exception even to this rule.

In February, 1844, the legislature passed an act entitled "An act to provide for assessing and collecting Public Revenue." § 12 provides that, all personal estate within this territory, subject to taxation, shall, except in the cases enumerated in the following section, be assessed to the owner

in the township or precinct where he shall be an inhabitant on the first day of May.

§ 13. The excepted cases mentioned in the preceding section are: 1st. All goods, wares and merchandize, or any other stock in trade, in townships or precincts within this territory, other than where the owner resides, shall be taxed in those townships and precincts, if the owner hire or occupy stores or shops therein, and shall not be taxable where the owner resides, &c. As an organization of a school district under the school law, is a complete legal subdivision of territory into a precinct, it follows that if the above statute remains unrepealed, the stock in trade of Ament was only taxable in district No. 2, where it was found at the time of the levy. This position, we think, was not seriously controverted in the argument by counsel for the defendant in error, but it was contended with much apparent confidence that the statute was repealed by the subsequent act of 1847, and hence the common law that the personal property follows the person, must govern. The act relied upon by the counsel for the defendant in error, as having repealed the act of 1844, is "An act to provide for levying and collecting revenue for state and county purposes."

This act, although a general one for the purposes expressed in the title, and providing in detail for the collection of the public revenue, is entirely silent in relation to the matter contained in the 13th § of the act of 1844. There is no provision as to whether the property embraced in that section shall be taxed where the owner resides, or where it is situated and used. Neither is there any section of the statute of 1847 which would indicate that the legislature intended to supersede the provisions contained in the 13th section. If that section is repealed at all, it must be by virtue of the repealing clause in the statute of 1847. A law is not necessarily repealed because the subject matter is covered by a subsequent statute, unless there is an express

repealing clause referring to the antecedent law, or unless there is a manifest inconsistency in the provisions of the two. The rule is well settled, that if both can remain without conflict, both should be enforced.

In Tennessee it has been decided: Where, in a subsequent statute, there is no express repeal of a former one, the former statute will not be considered as repealed by implication unless the repugnancy between the new provision and the former one is plain and unavoidable. *Planter's Bank* v. *The State*, 6 Smedes and Marsh. 268.

As there is nothing in the provisions of the last statute that will favor the repeal of the section referred to, if repealed at all, as we have said it must be by the repealing clause, which reads, that "all acts and parts of acts conflicting with the provisions of this act, are hereby repealed." Perhaps the best way to ascertain whether section thirteen conflicts with the provisions of the act of 1847, is to insert it as a distinct section, and see if there is the least repugnance. To do this it will be necessary also to insert the antecedent section 12, which refers to the property excepted in section 13. Those sections could appropriately be placed after section 9, in the act of 1847, without producing the slightest conflict, or in the least impairing the force of the preceding and succeeding sections.

If the legislature intended by the law of 1847, to repeal all of the provisions contained in the act of 1844, they undoubtedly would have adopted the usual repealing section in such cases, and referred to the act by its title and repealed it. But by adopting a contrary repealing clause, and repealing only such parts of prior acts as were in conflict, we must presume that they intended to save some of the provisions of the act of 1844. This was the only law in force at that time on the subject, and the one which, no doubt, the repealing clause was intended to reach. It is not then repealed by any thing contained in the body of the act. The affirmative enactment of the section not being

covered by the last law, a repeal cannot be inferred, and the section harmonizing entirely with the provisions of the last law, it is not repealed by the repealing clause, and it being an affirmative section, it cannot be repealed by implication. In the case of *Haynes* v. *Jenks*, 2 Pick. 172, the court say, "acts in *pari materia* are to be taken together as one law, and are to be so construed that any provision in them may, if possible, stand. Courts should therefore, be scrupulous how they give sanction to supposed repeals by implication."

And in the case of *Looker* v. *Brookline*, 10 ib. 343, the court say: "This latter statute does not contain any express repeal of the former one. And although we cannot comprehend the purpose for which the proviso was introduced, nor fully understand its import, *yet we cannot think it was the intention of the legislature to abolish by implication an important provision of the former statute upon the same subject.*"

If the court, in this case, would not declare a proviso repealed which they could not understand by a subsequent statute on the same subject, how much more ought we to hesitate before declaring a section repealed which is plain and obvious and easily understood, and the utility of which is perfectly apparent. There is a manifest propriety in taxing such personal property as is mentioned in the statute in the township or precinct where it is situated. It is there where the tradesman obtains his profits, enjoys all the benefits resulting from his trade, and there receives that protection in the enjoyment and use of his property which is secured to him by the municipal or township organization. There is a manifest propriety then in taxing such personal property in the township or precinct where such benefit and protection are obtained. Hence, the legislature provided in section 13 of the statute of 1844, for the assessment and collection of tax on such property where located.

In the language of the court in the case of *Looker* v. *Brookline*, we may say that "we cannot think it was the intention of the legislature to *abolish by implication an important provision of the former statute on the same subject.*"

There cannot be any doubt, the 13th § being still in force, that the property of Ament could only be taxed in district No. 2. It was embraced in that school district precinct. A precinct is defined to be a territorial district or division; the property therein coming within that territorial district or division, formed by the proper authorities, and the statute requiring that all goods, wares and merchandize, or any other stock in trade, other than where the owners reside, shall be taxed in those townships or precincts if the owners hire or occupy stores or shops therein, and shall not be taxable where the owners reside; and this section remaining, as we think, unrepealed, the court erred in deciding in effect that this property was taxable in district No. 1.

Judgment reversed.

H. O'Conner, for plaintiff in error.

Wm. G. Woodward, for defendant.

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SWAFFORD *v.* WHIPPLE.

No error in striking out, or sustaining demurrer to pleas that are inapplicable or insufficient.

Where a portion of the pleas were stricken out, without exception, and defendant went to trial on pleas considered good, the ruling of the court below, in relation to the rejected pleas will not be reviewed.

In an action of covenant on breach of warranty in a deed, the measure of damages is the consideration money paid, and interest.

The *onus probandi* lies upon that party who seeks to support his action or defence by facts of which he is supposed to be cognizant.

If, in an action of covenant, issue is joined on defendant's plea that he had title at the execution of the deed, the onus devolves on him to show the fact.

Parole testimony admissible to show the true consideration paid on a deed.

The amount named in a deed, only *prima facie* evidence of the amount paid.

ERROR *to Johnson District Court.*

Opinion by GREENE, J. Covenant by Whipple against Swafford, on a breach of warranty in a deed. The declaration states that the defendant on the 14th February, 1842, in consideration of two hundred and fifty dollars, conveyed and sold to the plaintiff a tract of land in Mercer county, Illinois, and that the plaintiff covenanted by the deed that he was lawfully seized in fee of the premises. The second count also sets out a covenant of seizure. Each count assigns the breach that the defendant was not seized in fee. By the record it appears that the defendant first filed a plea of performance of covenants, and after objection thereto by demurrer, filed six pleas: 1. Performance of all the covenants in the deed. 2. That he was lawfully seized of the premises. 3. That at the date of the deed he was seized of an indefeasible estate in fee simple. 4. Deed executed without a good consideration. 5. Deed obtained by fraud and circumvention. A motion to strike out the fourth and fifth pleas was sustained. On demurrer to the first three pleas, the court held the first to be insufficient, and that the second and third were good. At a subsequent term the defendant filed four additional pleas, which were numbered as the 4th, 5th, 6th and 7th pleas. A demurrer was sustained to all these pleas but the fourth, which averred that the deed was obtained by fraud and circumvention; thus leaving the second, third and fourth pleas upon which issue was joined. The cause was submitted to a jury, who returned a verdict for the plaintiff.

To the proceedings in this case, seven errors are assigned,

The first four relate to the pleadings. To the ruling of court in striking out the fourth and fifth pleas, and in sustaining the demurrers to the other pleas, we see no objection, as those pleas were either inapplicable or insufficient. Besides, the record does not show that the defendant objected to the decision in relation to them. By going to trial and resting his defence upon the three remaining pleas, and taking no exceptions to the ruling of the court in rejecting the other pleas, it must be presumed that the objection was waived. Had the party relied upon those pleas as material to his defence, he should have excepted below and should have had the matter presented to this court by bill of exceptions. *Cook* v. *Steuben Co. B'k*, 1 G. Greene, 463; *Eddy* v. *Wilson*, ib, 259. The same rule prevails in other States. In *Bowyer* v. *Hewitt*, 2 Gratt. 193, when no exception had been taken to opinion of the court rejecting a special plea offered by the defendant, it was held that the appellate court could not inquire into the correctness of that opinion. So in *Pelham* v. *Page*, 1 Eng. 535, where pleas were stricken out by the court below and not brought upon record by bill of exceptions; it was held that they could not in any manner, be regarded in the supreme court.

5. The fifth error alleged, is, that the court instructed the jury that if they believed the plaintiff ought to recover, the measure of damages which they ought to assess in favor of said plaintiff, is the amount of consideration money and interest on the same from the date of the deed, at the rate of six per cent. per annum.

We consider the objections urged to this instruction, without foundation. It does not necessarily limit the consideration money to the amount mentioned in the deed. It extends to the consideration money actually paid, and the legal interest thereon, agreeable to the wise, just, and moderate rule of common law, which has been adopted in most of the states of this Union. In Massachusetts, it is true a different rule was adopted in the first settlement of the

country, and still obtains. There, the measure of damages is the value of the land at the time of eviction. But in other states the measure is the value of the land or the consideration paid at the execution of the deed. In *Stark* v. *Ten Eyck*, 3 Caines, 111, it was decided that the damages for breach of a covenant of warranty are the amount paid, interest, costs of eviction and of the suit brought on the covenant. See also, *Pitcher* v. *Livingston*, 4 John. 1; *Bennett* v. Jenkins, 13 ib. 50; *Baldwin* v. *Munn*, 2 Wend. 399; *Sheets* v. *Andrews*, 2 Blackf. 274; *Bachus* v. *McCoy*, 3 Ohio 221; *Rutledge* v. *Lawrence*, 1 A. K. Marsh. 396; 3 ib. 354; *Tapley* v. *Lebrun*, 1 Mis. 550, 3 ib. 391; *Stubbs* v. *Page*, 2 Greenl. 378; 4 Dal. 441; 2 Dev. N. C. 30; 1 M'Mullan 37; 4 Humph. 99; 2 Harr., 304; 1 Pike., 313; 5 Barr Pa., 317; 5 Geo. 274. In *Sterling* v. *Peet*, 14 Conn., 245, it was held that in an action on a covenant of seizin, the damage is the consideration money and interest thereon; but upon a covenant of warranty the value of the land at the time of eviction. Chancellor Kent says, "the buyer, on the covenant of seizin, recovers back the consideration money and interest and no more." 4 Kent Com., 475. Under these authorities the correctness of the instruction, as a proposition of law, cannot be questioned.

6. The next point raised, is that the court erred in deciding that upon the issue joined, the burden of proof lay upon the defendant that he held the affirmative, and must first introduce evidence to sustain the issue, and that plaintiff was not bound to prove that the defendant had not kept his covenants as stated in the declaration.

It is a well settled rule of evidence that the party who alleges, shall prove the affirmative of any proposition. Ordinarily the issue lies upon the plaintiff, and the *onus probandi* is on him to establish what he affirms. But it frequently happens in making up an issue, the defendant assumes the affirmative proposition, or confesses and seeks to avoid the action, and would fail if no evidence in

avoidance should be adduced by him. In such event the proof is incumbent on the defendant as the party who would fail, if no evidence should be given on either side, or as the party who has thrown a negative proposition on the plaintiff, which might be difficult, and perhaps impossible for him to prove, and in relation to which, the defendant has all the evidence in his possession. Hence it is laid down that the *onus probandi* lies upon the party who seeks to support his action or defence by a particular fact of which he is supposed to be cognizant. Thus when a party pleads infancy, or a license, he must prove it. So if the defendant plead freehold in himself in an action of trespass *qua. clau. freg.* 1 Stark. Ev. 418–423.

In *Ayer* v. *Austin*, 6 Pick. 225, the same rule is recognized as applicable to all cases, when by the pleadings, nothing essential to the action is required of the plaintiff, and when the finding for the defendant depends upon affirmative proof from him.

In *Abbott* v. *Allen*, 14 John. 248, was an action where the defendant covenanted that he had good title, and the court held that as a grantor is not bound to deliver to his grantee his evidences of title, the legal presumption is that he retains and can produce them; that the plantiff holds the negative merely, and is not bound to aver or prove an outstanding title until the defendant discloses his title; and that it is only incumbent on the plaintiff to negate the title of the defendant, who pleads affirmatively that he had good title.

In the present case there was but a single point in controversy before the jury. The defendant pleaded that he was lawfully seized of the premises. Upon this question he assumed the affirmative; it was for his interest to prove it, as it would operate a complete bar to the action. The nature of the title to the premises may have rendered it extremely difficult, or even impossible for the plaintiff to prove the negative averment, as the only evidence in relation to the title may have been exclusively under the control

of the defendant. If he had title at the time the deed declared on, was executed, he could easily have shown it; and if he had no title the covenant was broken, regardless of any third person who may have had the title. We conclude then that the court did not err in deciding that the *onus probandi* lay upon the defendant.

7. The only remaining point to be considered is, did the court err in rejecting evidence offered by defendant to show what the real consideration was, and that it was for other and different consideration from that expressed in the deed?

The general rule is supported by all the authorities, that in a court of law where the consideration money is expressed in a deed for the purpose of conveying land, the law will permit no averment to the contrary. This rule is applicable to all cases where the object is to defeat the conveyance on other grounds than that of fraud; but not in cases where the amount actually paid as consideration money, becomes a material inquiry, and is the measure of damages to be assessed. It is by no means uncommon for a grantor to acknowledge one consideration in a deed, and receive a much less, or entirely different consideration in satisfaction. For that reason the rule now generally prevails in American courts, that the clause in a deed acknowledging a sum of money as consideration for the transfer, is open to explanation by parole proof. It is held that as a receipt for money may be explained by parole, so in that respect may a receipt of money expressed in a deed. *Shephard* v. *Little*, 14 John. 210. And in *Bowen* v. *Bell*, 20 John, 339, it was held that the general rule as to the inadmissibility of parole proof to vary a written contract, or show a different consideration from that expressed in a deed, is not applicable to a case where the payment or the amount of the consideration becomes a material inquiry.

In *McCrea* v. *Purmort*, 16 Wend., 460, parole evidence was held admissible to show that the consideration was iron at a stipulated price, instead of money. The following

cases also show the admissibility of parole proof to explain the consideration expressed in deeds: *Morse* v. *Shattuck* 4 N. Hamp., 229; *Pritchard* v. *Brown*, ib. 400; *Harvey* v. *Alexander*, 1 Rand. 219; *Steele* v. *Worthington*, 2 Ham. 182–187; *Hutchinson* v. *Sinclare*, 7 Monroe 219–293; *Gully* v. *Grubbs*, 1 J. J. Marsh. 388; *Belden* v. *Seymour*, 8 Conn. 304; *Schullinger* v. *McCann*, 6 Greenl. 364; *O'Neale* v. *Indge*, 3 Har. and M'Hen. 433; *Weigley* v. *Weir*, 7 Serg. and R. 309; *Wilkinson* v. *Scott*, 17 Mass. 249; *Mead* v. *Steger*, 5 Port. 498; *Saunders* v. *Hendrix*, 5 Ala. 224; *Tisdale* v. *Harris*, 20 Pick. 9. A very recent case in New York contains the same doctrine. In an action, like the one at bar, upon a a covenant of seizin, it was held, that the true consideration, and that only part of it had been paid, might be shown by parole for the purpose of ascertaining the measure of damages, although the deed expressed a different consideration and acknowledged that the whole of it had been paid; and that therefore there is no necessity for resorting to equity for relief in such a case. *Bingham* v. *Weiderwax*, 1 Comst. 509. Under these authorities it must be conceded that the rule is well established in this country, that the clause in a deed acknowledging payment of the consideration money is merely *prima facie* evidence of the fact, and may be explained, controlled or rebutted by parole evidence; and is only conclusive to estop the grantor from alleging that the deed was executed without consideration. Upon this point then, the ruling of the court below was erroneous, and the judgment must be reversed.

Judgment reversed.

C. Bates and *J. D. Templin*, for plaintiff in error.

Wm. Smyth and *I. M. Preston*, for defendant.

Steamboat Wisconsin *v.* Young.

Where an original invoice of goods appears by evidence satisfactory to the court, to have been lost or mislaid, a memorandum of the items, as copied by the witness, as clerk of the party, was admitted in order to show what items were in a box for which, the steamboat was sued.

Parole evidence admissible to show fraud or a mistake in making a bill of lading.

Error *to Muscatine District Court.*

Opinion by Williams, C. J. William L. Young brought suit to November term of the district court of Muscatine county, 1849, against the steamboat Wisconsin. The plaintiff filed his declaration on the contract as per bill of lading, which is in the usual form.

After averring the legal obligations and duties of the boat by virtue of the bill of lading, the declaration proceeds to aver that only a part of the goods enumerated and specified in the bill of lading was delivered, and that the boat kept and retained in her possession one of the cases of merchandise, of the value of one hundred and forty-eight dollars and sixty-nine cents, and refused to deliver the same to the plaintiff. or to account for the same in any manner to the satisfaction of the plaintiff.

A specific account of the articles contained in the case, which, it is alleged, was not delivered or accounted for by the boat, is embodied in the declaration, and damages claimed to the amount of two hundred dollars. Thomas H. Griffith, master of the boat, on the 7th of November, 1849, appeared and filed two pleas in defence of the plaintiff's action, one of which denies the undertaking and promise, as set forth in the declaration, and the other is the plea of "not guilty" in manner and form, &c. On motion of the defendant, the cause was continued to the June term. At that term the parties, by consent, waived trial by jury

and the cause was submitted to the court. A judgment was given for the plaintiff for one hundred and fifty three dollars and fifty-seven cents, damages and costs.

On the trial, exceptions were taken to the ruling of the judge, which appear of record here, and the following are the assignments of error:

1st. The court permitted a copy of the original invoice of pieces—or parcels of goods—to be used in evidence, without first sufficiently accounting for the non production of the original.

2d. There was no testimony as to the value of the goods.

3d. The court refused to hear testimony that there had been a mistake in the original bill of lading.

It appears by the testimony as contained in the bill of exceptions, that, among other things, eighteen cases or boxes of goods were shipped on board the steamboat Mountaineer, on the Illinois river, marked, "W. L. Young, Muscatine, Iowa." On the arrival of the Mountaineer at St. Louis, the goods were transferred by shipment on board the steamboat Wisconsin, to be delivered at Muscatine—or Bloomington—on the upper Mississippi. On the arrival of the Wisconsin, at the port of Bloomington—or Muscatine—but seventeen cases of goods marked for W. L. Young were found on board, and that number delivered, leaving one to be accounted for by the boat. With the seventeen cases marked W. L. Young, one other was found marked for "Coperas Creek, Illinois." This last named case was claimed by the owner at Coperas Creek, and delivered to him. But the case belonging to Young, according to the terms of the bill of lading, was not found after search made.

On the trial, the plaintiff below offered to prove by his clerk the number and value of the articles which were put up and contained in the case which was missing, or alleged to be lost by the boat, which had been ascertained by the witness by comparing the contents of the seventeen cases of the goods with the invoice of the goods shipped;

thereby showing that the goods mentioned in the declaration were missing, and not delivered by the boat to Young; and also the prices of the articles, amounting to $141 61. To this testimony the defendant below objected, for the reason that the original invoice was not produced; that being the best evidence. Thereupon W. L. Young, the plaintiff below, was called and examined to prove impossibility of producing in evidence the original invoice. Being sworn, he stated that "he made search for it in every place where it was likely to be found, and could not find it. That he had been in the habit of keeping it in the top of a valise, with other papers; that he went to the state of Michigan last fall and left the valise there; that if the paper was in existence, it was probably there; that he had not thought but that he could lay his hands upon it at any moment until that day, when he had made thorough but ineffectual search for it." The clerk was thereupon permitted to state the contents of the missing case from a memorandum which he had made of the missing articles at the time of opening the other cases, to which the defendant objected. The objection was overruled by the court, and the evidence permitted to be given.

This ruling of the court furnishes the ground for the first assignment of error. We think that the ruling in this matter is in accordance with the usual and necessary requirement of law. That a party who seeks to make out his case on trial before judicial tribunal, must do so by producing the best evidence which the nature of the case will admit of, is a principle well established in jurisprudence. But if that evidence be documentary, and it be lost or mislaid, so that it cannot be produced for the purposes of the trial, upon satisfactory showing of this fact, secondary, or the next best evidence of its contents is allowable, that the ends of justice may be attained. This rule of evidence, arising from necessity and of universal acceptation, is not assailed by the counsel for the plaintiff in error; and no

argument is necessary to establish its propriety. But it is contended that the loss or non production of the original invoice is not established, or accounted for, so as to warrant the reception of the secondary evidence, as allowed by the court below. The plaintiff, Young, clearly states that he had searched diligently for the paper in every place where it would be likely to be found. He does not pretend to say that it was in the valise which was, at the time of the trial, in Michigan, in which he had kept it with other papers, but he states that, if in existence, it is there. If it were then in Michigan, it was impossible to procure it for the trial then progressing from so distant a place; so that for the purposes of the trial, it could not be produced. There is nothing in the evidence as contained in the bill of exceptions, which shows that it was beyond the reach of the process of law and out of the power of the plaintiff below to produce it on the trial, by design in order to enable him to take any undue advantage of the defendant. If such design had been suspected, the counsel for the defendant might and should have pressed his cross-examination of the witness on this point, so as to have ascertained the fact. The ruling of the district court on this point is correct. We think the ground laid for the introduction of the secondary evidence was sufficient, and that it was properly received.

The second assignment of error, we think is satisfactorily disposed of by the evidence of the clerk of Young, which is made part of the bill of exceptions in this case, and which proves the value of the goods contained in the case which was not delivered by the boat. Enough is there set forth in evidence on this point to warrant the verdict.

The last and principal error assigned, will now be considered. The defendant below offered to prove that there had been a mistake in the original bill of lading, as written; and by virtue of which the plaintiff sought to charge him with, and recover the price of the case of goods alleged

to be lost or retained by him. The court ruled the evidence inadmissible. This evidence was rejected by the court on the ground that "there was no ambiguity in the form of the bill of lading which required parole explanation." Here we think the court erred. That parole evidence cannot be received to contradict a written instrument of contract, is well established as a general rule. But this rule has its exceptions as well as others of equal utility and propriety. It is not only allowable to admit of parole testimony to explain a written contract where the instrument is at fault by reason of ambiguity patent or latent, but the courts have long held that parole evidence is admissible to show fraud or mistake in making it. If there be fraud used in the making or execution, or if, by mistake, the instrument be made to contain more or less in substance than was agreed upon by the parties contracting, it is not their contract. Reason and justice alike, dictate the propriety of legal interposition to prevent the enforcement of wrong so manifest, by adhereing rigidly to a general rule, and thereby binding a party to that for which he had never contracted. That parole evidence may be given to show fraud or mistake in the making or execution of a written agreement or contract, the following cases are cited: *Jarvis* v. *Palmer*, 11 Page 650; *Broadwater* v. *Daine*, 11 Missouri 277, *Byrne* v. *Swing*, 6 B. Monroe 199; *Dick* v. *Martin*, 7 Hump. 263; *Carter* v. *Bunis*, 10 Smeads and Mar. 527; *Lockett* v. *Child*, 11 Alabama 640; *Wood* v. *Perry*, 1 Barb. 114; *Deshon* v. *Merchants Ins. Co.*, 11 Metcalf 199. On this subject we have no difficulty in finding cases of highest authority, in the books. However, convinced as we are of the justice and legal propriety of allowing evidence to show mistake in the making of an instrument of writing, such as a receipt or bill of lading, in confirmation of that conviction we find a case exactly in point. The case of the *Steamboat Missouri* v. *Webb*, 9 Missouri R., establishes the rule that "a bill of lading partakes of a receipt and contract; and so far

as it partakes of the nature of a receipt, it may be explained by parole." We deem it unnecessary to discuss the question further, or to array the numerous cases in the books in support of this decision. Its propriety is founded in reason, and supported by an ample current of decisions of the highest authority.

We are of the opinion that the court erred in rejecting the parole testimony, as offered to show mistake in the bill of lading.

Judgment reversed.

S. Whicher, for plaintiff in error.

Wm. G. Woodward, for defendant.

ALLENSWORTH *v.* MOORE.

A note made payable to D. or *bearer* is transferred to the holder by delivery, and possession is *prima facie* evidence of ownership.

When M., as holder of a $100 note, payable to bearer, gave a receipt for it in Kentucky for $53 50, "to be paid when the note becomes due;" held that such receipt would not preclude M. from maintaining an action in his own name, on said note.

ERROR *to Linn District Court.*

Opinion by KINNEY, J. Moore sued Allensworth in assumpsit. The defendant pleaded the general issue. The cause was submitted to the court, and judgment rendered for Moore. Allensworth excepted to the ruling and judgment of the court, and embodied the following facts in his

bill of exceptions. His note introduced as evidence by the plaintiff below reads thus:

"For value received I promise to pay to Aaron Dow, or bearer, one hundred dollars, on or before the 25th of December, one thousand eight hundred and forty-nine, with ten per cent. interest, from the 28th of December, eighteen hundred and forty-seven. JAMES ALLENSWORTH.
July 13th, 1847."

After introducing this note the plaintiff rested. The defendant then introduced the deposition of one Saucer, in which he swears that he was once the holder of the note, and that he let Samuel Moore have it in security for fifty-three dollars and fifty cents; that Moore gave him a receipt which was then in the possession of James Allensworth. The receipt deponent transferred to Aaron Dow in July, 1849. The defendant then introduced the following receipt, being the one referred to by Saucer in his deposition:

"Received of Theodore Saucer a note for one hundred dollars, due on the 25th day of December, 1849, on James Allensworth, in Linn county, Iowa, in security for fifty-three dollars and fifty cents; to be paid over to Samuel Moore when the note becomes due. SAMUEL MOORE.
Dubuque, April 10th, 1849."

Upon this evidence the court rendered judgment for the plaintiff for the amount of the note and interest. The defendant then filed a motion for a new trial, and in arrest of judgment, which was overruled.

The errors assigned are, that the court erred in overruling this motion, and that judgment should have been rendered for the defendant instead of the plaintiff.

We do not think there is any error in the judgment of the court. The note having been made payable to Dow or

bearer, passed by mere delivery, and being found in possession of Moore, the law presumes him to be the proper and legal owner thereof. This presumption the defendant must rebut in order to defeat the action. He may do this by showing that the title to the note was not in Moore, or that he had not a substantial interest in it, as on such showing a judgment of nonsuit would be proper, as without such title or interest he could not maintain a suit in his own name. For this purpose the deposition of Saucer is introduced, by which it appears that he once owned the note and let Moore have it in security for fifty-three dollars and fifty cents. Saucer also swears that he had transferred the receipt to one Aaron Dow, and that it was then in the possession of Allensworth. It might be doubtful from this testimony whether Moore had such an interest in the note as would enable him to maintain a suit in his own name, for it would appear that the note was intended more as a pledge, than that any interest in it was absolutely transferred. But the receipt in the possession of the defendant, we think, clearly repels all such inference or conclusion. We cannot place any other rational construction on the language of the receipt, than that the money, when the note should become due, was to be paid over to Moore by the payor. Moore had an absolute property in the note to the amount of $53,50, and the right to receive the whole amount. According to the authorities, the note being payable to the bearer, and being in the possession of Moore, and he owning not an equitable but a legal interest in the note, he would be enabled to maintain a suit in his own name against the maker. The evidence then of the defendant, instead of rebutting the presumption of title in Moore, at most, only shows that he did not in the first instance own the entire note. Dow, to whom Saucer had transferred the receipt, does not claim to have any interest in the note, and for aught that appears, Moore may have purchased this interest of Dow, and at the time of the commencement of the suit, the title to the

entire note may have been in him. This view of the case is strenghtened by the fact that it does not appear that the receipt was ever transferred or assigned to Allensworth. The presumption of law then being in favor of Moore, and that at least the legal interest in the note belonged to him, and the evidence not being sufficient to defeat an action in his name, the court did not err in rendering judgment for the plaintiff.

Judgment affirmed.

Wm. Smyth and *J. D. Templin*, for plaintiff in error.

I. M. Preston, for defendant.

Romp *v.* The State.

Where sections 4 and 5, of the gaming law, prohibit the same games of chance, and 4th "excepts games of athletic exercise," and the 5th § contains no exception, held that an indictment avering no exception would be good under the fifth section.

The negative exception, in a penal act, need not be avered, as the defendant may show in defence that his acts come under such exception.

In an indictment for suffering gaming it is not necessary to designate the persons who played, nor the amount of money or kind of property lost or won.

When an offence is charged in the language of the statute, it is sufficient.

Error *to Johnston District Court.*

Opinion by Greene, J. Indictment for suffering gaming under the eighth section of "an act to prevent and punish gaming. Rev. Stat. 275. The indictment contains five counts which were mainly drawn after the English precedents "for causing and procuring gaming." A motion

made to quash the several counts was overrruled, and the cause was submitted to a jury, who found the defendant guilty on the first, second and fifth counts. The defendant then moved the court to arrest the judgment, on the ground that the three counts on which judgment was rendered are informal and insufficient. The motion was overruled. The only errors assigned, upon which reliance is placed, involve the sufficiency of those three counts.

1. The first objection urged is, that neither of the counts, negative the exception in the fourth section of the statute, which prohibits playing for money or property in any tavern, grocery or race-field, or in any booth, arbor or out-house connected therewith, or in any other public place, at any game or games whatsoever, "except games of athletic exercise." It is insisted that each count should negative by averment that the games suffered were not of athletic exercise.

The eighth section of the act forbids any keeper of a tavern, grocery, or other house of public resort to suffer any game or games prohibited by the act. The games prohibited are not only those referred to in the fourth section, but also those described in sections five and six of the act, and in them there is no exception as in section four; in fact section five appears to supercede section four. It provides, "that if any person, by playing or betting at any game or wager whatsoever, at any time, shall lose or win to, or from another, any sum of money or other article of value, the loser and winner shall each, on conviction, be fined in a sum not less than twenty nor more than fifty dollars," &c. This section comprises all and much more than is expressed in section four, and prohibits without any reservation. As all the games described in the three counts of the indictment come within the general prohibition of section five, and as that section is without the exception of athletic exercise, it may well be considered that this exception need not be set out in the indictment. Besides, two

of the counts come within the gaming described in section six, which is also without the exception, which furnishes an additional reason why the objection should not prevail.

According to Archbold's C. P., p. 52, it is only necessary to aver the exception when it is contained in the same clause of the act which creates the offence. In the present case the clause creating the offence is far removed from that which affirms the exception, and hence this rule cannot avail the plaintiff in error. Had the indictment been founded upon section four, which contains the exception, there would be more propriety in requiring the negative averment. But even then the necessity for it might well be questioned. It is laid down that the negative exception in a penal statute need not be set out. 4 Hawkins P. C. 67, p. 21; 1 Black. R. 230; 2 Hawk. P. C. 322–323, §§ 18–22. There is the less necessity for such negative averment, as the defendant may by evidence establish the exception in his defence.

2. The other objections taken to the indictment are: 2. That the names of the persons who played are not set forth. 3. The sums of money are not named. 4. The property lost or won is not described. But as the offence does not consist in suffering gaming by any particular class of persons nor for any particular sums of money, or specific kind of property, no such particularity of description is necessary. The prohibition is general. The offence consists in suffering any game or games prohibited by the statute. It matters not by whom or for what the game was played. In Kentucky it has been decided that the offence is consummated by suffering a game to be played, and that it is not necessary to name the persons engaged. 4 Bibb. 261; 3 J. J. Marsh. 133. In *The State* v. *Bougher*, 3 Blackf. 307, in an indictment for gaming, it was held unnecessary to state the particular game played; so also in *The State* v. *Dole*, ib. 294, in an indictment for permitting gaming.

The indictment in this case contains much surplusage

and many unnecessary averments; but still with all its redundancy, the offence is charged in the language of the statute; and this we have repeatedly decided is all that should be required. It is rendered sufficiently specific to enable an acquittal or conviction to be pleaded in bar to another prosecution.

We are therefore of the opinion that the court below did not err in overruling the motion to quash, nor in refusing to arrest the judgment.

Judgment affirmed.

G. Folsom, for plaintiff in error.

J. D. Templin, for defendant.

FRIEND & Co., *v.* BEEBE.

Where the indorser at the time he assigned the note, requested the indorsee not to enforce collection against the maker until the next fall after the note became due, and during such indulgence the maker became insolvent; held that the indorser could show these facts by parole in justification of the delay.

An indorser of a note cannot avail himself of delay in commencing suit against the maker, where he expressly requested such indulgance for the maker.

Parole evidence admissable to show upon what terms and conditions the note was assigned by indorsement.

ERROR *to Washington District Court.*

Opinion by WILLIAMS, C. J. Jesse Beebe brought suit in assumpsit against the firm of J. H. Friend & Co., as the indorsers of a promisory note given to the firm by one Lyman Chase, dated April 24th, 1848, for eight hundred

and twenty-one dollars and twenty cents, and payable to J. H. Friend & Co., or order, one day after date. In 1848, after the note became due, being unpaid, it was transferred by indorsement, by J. H. Friend & Co., to Jesse Beebe. After due and dilligent prosecution, in order to secure the payment of the amount of the note from Chase, and failure to collect it, Chase being insolvent, this action has been commenced against the firm as indorsers. The note is in the common form, promising to pay the sum of eight hundred and twenty-one dollars and twenty cents, for value received. It is endorsed: "Pay the within note to Jesse Beebe. J. H. FRIEND & Co."

The plaintiffs declared specially and also in common counts, and filed a bill of particulars.

The attorney for the defendants demurred specially, and the demurrer was sustained as to the first and sixth counts in the declaration. The defendant then put in his plea of non-assumpsit to the other counts, issue was joined and the cause heard by a jury. A verdict was rendered for the plaintiff for nine hundred and forty-nine dollars and ten cents, and judgment entered thereon. Several questions were raised on the trial as to the evidence, &c., which were duly disposed of by the court. Deeming but one of these of sufficient importance to demand special attention here, we will proceed to dispose of it. It appears by the bill of exceptions, No. 2, that on the trial the plaintiff, Beebe, offered evidence to the jury, to prove that at the time the note was transferred and indorsed to him by J. H. Friend & Co., "J. H. Friend, defendant, and the acting member of the firm of J. H. Friend & Co., requested said Beebe not to sue on said note until fall, and that it was then and there understood between Friend & Beebe, that said note should not be sued on until fall in said year." This evidence was objected to by the defendant's counsel. The objection was overruled, and the court permitted it to go to the jury. To

this ruling of the court defendant excepted. The court also on this point instructed the jury as follows: "If the jury are satisfied from the evidence that the plaintiff in this case was induced, at the request of the defendants, not to commence suit against the maker of the note until the expiration of a certain length of time, named by the parties, and if the jury are furthermore satisfied from the evidence, that at the expiration of the time so agreed upon by the parties, in which suit was not to be commenced against the maker; the plaintiff having acted upon that request, a suit would have been unavailing against the maker up to the time of the commencement of the present suit, then the plaintiff will be entitled to recover."

The admission of the evidence above stated, and this instruction of the judge is complained of as error.

The only question here presented is this: Did the court err by allowing plaintiff to prove the parole agreement of the parties as to the time when Beebe should proceed to collect the amount of the note from Chase; that agreement being cotemporaneous with the execution of the assignment? This question has been adjudicated, in substance, heretofore; although presented in shape somewhat different. The principle involved has been settled. The general rule "that cotemporaneous conversations and undertakings of the parties at the time of the making of a written contract, cannot be admitted to vary, change or contradict that contract is fully recognized by this court. But to let it apply to every contract in the making of which it becomes proper and necessary, for some special purpose appertaining to such contract, to make an instrument in writing would thwart the highest designs of both law and justice. For the ruling of this court on this subject we refer to the cases of *Taylor for the use of D. S. Baker* v. *David Galland and others;** and the case of *The Steamboat Wisconsin* v. *W. L. Young.*†

*Ante. 16. †Ante. 269.

Although parole agreements made previous to, or cotemporaneously with the execution of a written contract, concerning the same subject matter, cannot be permitted to vary, contradict or destroy that which has been written; nevertheless it has been often adjudged by the courts that parole testimony may be allowed to show mistake or fraud in such contract. The principle is also well established, that where the written contract is incomplete, or where the written instrument does not purport to set out a contract at large in terms, but is evidently made to carry out some specific object relating to, or arising from, the contract between the parties, then parole evidence of the contract may be given.

But the case at bar presents the question in this shape: Friend, who transferred the note, at the time of the assignment, standing in the legal position of an assignor, liable on his indorsement to Beebe, if the latter should exercise proper diligence in urging the payment by Chase, himself proposes and requests of Beebe that he should not proceed to collect it until fall; to this Beebe agrees, and accordingly keeps the agreement on his part. Having proceeded at the expiration of the time appointed, he finds Chase insolvent; returning to Friend, the assignor, for his money he is informed that he had been negligent in not proceeding, at once, to collect the note from Chase, and that he, Friend, is not liable on his indorsement. It is fairly presumable that, as men of business, each of the parties understood his rights and responsibilities under the assignment. Doubtless if this parole understanding and agreement had not been made, Beebe would have proceeded without delay to collect the amount of the note from Chase, so that in case of failure he might have legal recourse on Friend & Co., the assignor. Friend likewise must have known this. The legal effect of this agreement was that he undertook to release Beebe from the obligation to press the collection of the money from Chase until the fall, and agreed on that

condition to be responsible for the consequences. Assignments are mostly made in brief by indorsing the name of the assignor. The terms on which the assignment is made is seldom if ever given in extenso; but the assignor may assume the responsibility of releasing the assignee from the legal necessity of pressing the payment by legal procedure. If he do so, he is responsible in case of the failure to pay on the part of the drawer, should he become insolvent. The evidence here offered in parole was part of the res gestae. The agreement made created a liability on the part of Friend & Co., which he would not have rested under by virtue of the mere indorsement on the note in blank. To permit him to escape from that liability, upon the event of Chase's insolvency, within the time prescribed in the contract and within which Beebe was not to sue, would be to give countenance to a fraud on Beebe, who acted in good faith.

It has been decided in Pennsylvania that "conversations at the time of a transaction are a part of the *res gestae*, and may be proved." *Rock* v. *Howell*, 7 Watts and Sargt. 350.

It has also been decided that "parole evidence is admissible to show that a written agreement had been received so far as related to the time of the delivery of a chattel." *Chiles* v. *Jones*, 3 B. Monroe, 51. For authority touching this point we refer to *Minchee* v. *Cook*, 1 Alabama 41; *Hayworth* v. *Worthington*, 5 Blackford 361. In this latter case a bill of sale *absolute* in its face had been given, yet it was decided that parole evidence was admissible to show that it was intended by the parties to operate only as a mortgage. The learned judge remarked in deciding this case, "that these decisions are based upon the assumption that the admission of such evidence is necessary for the prevention of fraud." Clearly, if the substance of this agreement by parole had been to expose a fraud, or had been to show mistake, it would be admissible in evidence.

If a solemnly written agreement may be waived and

proof of that waiver be made in parole, certainly a mere indorsement of assignment on a note may be qualified by the express agreement in parole of the parties at the time of making it; and parole evidence of that agreement may be allowed to enforce the legal obligations of that agreement. Such evidence is not taken to vary, contradict, explain or destroy the assignment, but to establish the truth between the parties as to their terms and conditions upon which the assignment was made; that their expressed design may prevail instead of that which otherwise would exist by implication of law. The principle here decided is maintained in 2 vol. Cowan and Hills notes, 1460, 1461, 1472, 1473.

We find no error in the instructions given by the judge to the jury. As the other points in the case are deemed unimportant, we will omit noticing them.

Judgment affirmed.

N. Everson, for plaintiff in error.

Curtis Bates, for defendant.

HIGLEY *v.* BRYAN.

An erroneous description of a note in a justice's transcript may be corrected by an amended transcript. A variance resulting from such description is not sufficient ground for non suit.

ERROR *to Linn District Court.*

Opinion by KINNEY, J. Suit commenced by Higley against Bryan & Co., before a justice of the peace upon a note which reads as follows:

"On first of September next, I promise to pay H. G. Higley or order, seventy-eight and sixty-six one-hundredth dollars, for value received. H. LEGREE BRYAN, for H. L. BRYAN & Co.

Aug. 16th, 1850."

This note was filed with the justice as the cause of action, and judgment by default rendered thereon for the face of the note, with interest. The defendants appealed. The justice, in giving a copy of the note in his transcript, inserted the word *the* before first and omitted the figures 66-100 and inserted the words "sixty-cents. In the district court the plaintiff obtained a rule on the justice to perfect his transcript. The justice, in answer to this rule, stated that he had examined his docket and that the transcript filed is a true transcript of the cause as entered therein, but that it appeared by the docket and the transcript filed, that he erroneously copied the note in the docket, and also in the transcript, and that he neglected to endorse on the back of the note the filing. The justice then stated the facts to be that the plaintiff filed on the 28th day of November, 1850, a note as his cause of action, and that the note was then on file in the district court, which he copied and identified as the note filed, and as the plaintiff's sole cause of action, and that the judgment rendered by him, was rendered upon said note; and he also states the variance in the note, and the one set out in the transcript to be as before stated. From the bill of exceptions it appears that the plaintiff, Higley, offered in evidence the note; the introduction to which the defendant objected, and the court sustained the objection, on the ground of variance between the note offered in evidence and the note described in the transcript, and refused to permit said note to be read in evidence in said trial, and thereupon rendered judgment of non-suit against the plaintiff, to which the plaintiff excepted. This ruling of the court is assigned for error. We think

the decision of the court erroneous. By Rev. Sat. 335, § 7, it is provided that "upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the justice."

We cannot regard the misdescription of the note by the justice in any other light than that of a clerical error. He did not copy it correctly into his docket, and consequently in making out his transcript fell into an error, in describing the note. This error we think could be corrected by an amended return. Section ten provides that when the court is satisfied "that the return of the justice is substantially erroneous or defective the court may by rule and attachment compel him to amend the same." The return in this case was erroneous, not technically so it is true if confined to the entries made in the docket, but so in point of fact, in relation to the note on file which constituted the cause of action. The justice had a right in answer to the rule to correct the error which he had made in copying the note in his docket. He was not obliged under the statute to copy the note into his docket; as a brief statement of the nature of the plaintiff's demand would have been sufficient; but if in doing this he made a slight mistake, it would certainly be a great hardship upon the party to have his case dismissed in the district court on that account, particularly after the error was corrected by the amended return, and the note indisputably identified as the note on which judgment was rendered.

Judgment reversed.

I. M. Preston, for plaintiff in error.

Wm. Smyth, for defendant.

WOODWARD *v.* GREGG.

The *entire* proceeds of fines for penal offences, without abatement for attorneys fees, to go into school fund.

ERROR *to Muscatine District Court.*

Opinion by GREENE, J. This was a motion filed in the district court by Asa Gregg, school fund commissioner, of Muscatine county, for a rule upon W. G. Woodward, the prosecuting attorney, to pay over to said Gregg all monies in his hands, collected on fines for violating the criminal laws of the state. Woodward answered that he was entitled to the balance retained by him as fees allowed to the prosecuting attorney in criminal cases. It appears that he paid over all but the amount retained for his fees. The court decided that the attorney was not entitled to his fees out of funds thus received, and rendered judgment against him accordingly.

This decision is claimed to be erroneous; and reliance is placed on Art. 10, § 4, of the state constitution. It provides that "the clear proceeds of all fines collected in the several counties for any breach of the penal laws shall be exclusively applied, in the several counties in which such money is paid or fine collected, among the several school districts of said county." The twenty-second section of the common school law of 1847, appropriates the money paid for exemption from military duty, and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, and all funds in the treasury arising from the sale of water crafts, lost goods, and estrays to the use of common schools in the county where they accrue. Laws of 1847, p. 131. The school law of 1849—see laws of that year p. 107 § 86—is in affirmance of the above appropriation, and further provides that the same shall "be paid

over, in cash, by the person collecting the same within twenty days after collection, to the school fund commissioner of the county in which the same shall have accrued," &c. It is, perhaps, difficult to determine what is meant by the phrase "clear proceeds," of all fines; but we can by no means come to the conclusion that those clear proceeds can only be determined after deducting the fees of the attorney, in whose hands the funds may have been placed. To authorize the declaration of such charges would, we think, do violence to the intention expressed in the constitution and laws upon that subject. The constitution requires that the clear proceeds of all such fines "shall be *exclusively applied*" to school purposes. It certainly would not be such exclusive application of those funds to pay from them the fees of prosecuting attorneys in criminal cases. Those attorneys are required to attend to such cases by virtue of their office, and are entitled to compensation for their services from their respective counties—Laws of 1847, p. 42—and not from fines which may have been received in such cases.* As ample remuneration is provided without recourse to those fines, there is no reason why they should be diverted from their legitimate object.

The framers of the constitution probably contemplated that fines might be made payable in county orders or state warrants, or that there might be a forfeiture of property as a fine for a breach of some penal laws, and therefore required that the clear proceeds of such should be applied to the several school districts. And this inference is supported by the eighty-sixth section of the laws of 1849, which provides that such fines shall be paid over in cash. It was from this view, we think, that the term "clear proceeds" was incorporated in the constitution. Considering the important object to which such proceeds are applied, we feel the more reluctance in subjecting them to charges which can only be sustained by remote implication.

The form of the proceeding is also objected to; but as we

can conceive of no injustice that can result from that manner of proceeding, and as the school fund commissioner is authorized by law to receive the funds, we must conclude that the court below decided correctly.

Judgment affirmed.

Wm. G. Woodward, pro. su.

J. Butler, for defendant.

TRYON *v.* OXLEY.

To justify a recovery upon an order not accepted, it is not necessary for the plaintiff to prove that the defendant was indebted to the payee at the date of the order.

A court need not instruct a jury upon an abstract proposition.

A failure to present an order, drawn for lumber, within one week from its date, does not show want of due diligence.

Unless shown that the drawer, of an order or inland bill, sustained injury by the delay, it is sufficient to show presentment or demand at any time before suit.

Where an order was signed by "D. T., administrator," without designating the estate for which he acted, judgment may be rendered against him personally.

ERROR *to Linn District Court.*

Opinion by GREENE, J. Celia Oxley sued Dennis Tryon upon an instrument in the following words:

"LINN CO., May 13, 1847.

MR. WILLIAM STRETCH: *Sir:*—

Please pay Charles Pinckney, or bearer, fifteen hundred feet of oak lumber, due from Daniel M. Peet, and charge the same to me.

DENNIS TRYON, Administrator."

The plaintiff recovered judgment for fifteen dollars before a justice, and also in the district court, against Tryon in his private capacity.

On the trial several instructions were asked and refused:

1. The court refused to instruct the jury that the plaintiff, in order to recover, must prove that the defendant was indebted to Pinckney at the time he gave the order. But upon this point the court did in substance charge the jurors that if they were satisfied, from the evidence, that the plaintiff held an order upon Pinckney, which was given up to the defendant in consideration of the order upon which this suit is brought, and that the defendant received the money upon the Pinckney order, it would be sufficient consideration to support this action. Under this charge we think the instructions asked were properly refused. The charge upon this point comprises all that could be considered appropriate. It was by no means indispensible to a recovery that the plaintiff should prove an indebtedness from the defendant to Pinckney at the time the order was given; the consideration would give validity to the contract if the indebtedness had been from some other person, and the defendant, by arrangement, had assumed the payment by giving the order. Such an instrument too, might be good without an indebtedness between any of the parties, upon a consideration delivered after the order was made. It is clear then that the instruction asked cannot be considered, even in its general application, as correct; but it was properly refused in this case on another ground. It appears to be an abstract proposition not legitimately connected with the issue or evidence in the case, and upon such propositions courts are not bound to instruct juries. *Lewis v. State*, 4 Ham., Ohio, 388; 5 ib. 88, 375; 3 Wend. 75; 1 Mis. 97; 1 Dana, 35; 7 J. J. Marsh 194; 4 Shep. 171; 9 ib. 246; 4 Serg. 137; 1 Gilman 141.

If the instruction asked had even been a correct legal proposition, it would not have been error to refuse it, unless

it approved applicable to the evidence before the jury and the merits of the case as presented by the parties. *Clymer* v. *Dawkins*, 3 How. U. S. 674; *Clark* v. *Vorce*, 19 Wend. 232; *Leven* v. *Smith*, 1 Denio. 573. Although the order in this case expresses no value received to Tryon, still it does show an indebtedness from Peet to Penrose, and that Tryon assumed the payment of that indebtedness by drawing upon Stretch for the lumber, and upon this point there appears to have been evidence adduced which we must presume, proved to the satisfaction of the jury that the payment was assumed in a valid manner and upon legal consideration.

2. The court, though requested, refused to instruct the jury that if the parties to the order lived in the same county where it became due, and there was more than one weeks delay in presenting it for acceptance, there was a lack of due diligence, which would prevent the recovery sought. The refusal of the court to give the above was be no means erroneous. The situation of the parties may have justified a longer delay than one week in presenting an inland bill or order of this character. In the absence of evidence upon this point, we must presume that the circumstances of the case amply justified the court in refusing the instruction.

There is no fixed rule for the presentment of a bill or an order like the present. It is sufficient, if presented within a reasonable time. Frequently both inland and foreign bills are continued in circulation for weeks, or even months, before presented to the drawee for acceptance or payment.

In *Gowan* v. *Jackson*, 20 John. 176, a bill drawn in Antigua, on London, payable ninety days after sight, dated in July and not presented till the January following, was held to have been seasonably presented, under the circumstances; it having passed through several hands. Reasonable diligence, to be determined by the circumstances of the particular case, is all that is required by the books. If there has not been proper diligence, and the drawer has

sustained damage in consequence of the laches he would no doubt be discharged from liability. Several authorities have held that unnecessary delay alone, in the presetment, would discharge the drawer, and this doctrine may very properly be enforced as between the holder of a bill, order or check, and an indorser. But why should such strictness prevail between the holder and maker, or drawer? A presentment or demand at any time before the suit is commenced should be sufficient to enable the holder to recover, unless it should appear that the drawer sustained injury by the delay. This doctrine has been recognized as sound law, in several important cases. *Cuyer* v. *Armstrong*, 3 John Cas. 5; *Comog* v. *Waner*, ib. 259; *Com. Bank* v. *Hughes*, 17 Wend. 94; *Harker* v. *Anderson*, 21 ib. 372; *Murray* v. *Judah*, 6 Cowen, 490; *Little* v. *Phenix Bank*, 2 Hill 425; *Cromwell* v. *Lovitt*, 1 Hall 68; 2 ib. 463; 2 Story R. 502; 3 Kent's Com. 88, 4th Ed.

3. The only remaining error urged in this case is, that the court rendered judgment against the defendant in his private capacity, and not against him as administrator. In this too, we think the court acted correctly. Although the word "administrator is annexed to his name, there is nothing in the order designating the deceased person, or estate to which his administration applied. It can, therefore, be only considered as his own private order.

In *Lossey* v. *Church*, 4 Watts and Serg. 246, it was held that the addition of the word "administrator" to the name of the acceptor of a bill of exchange, does not qualify his liability or make his acceptance conditional. Upon the same rule it cannot limit or qualify the liability of the drawer.

It is a general rule that a party cannot be held responsible on a bill, note or order unless his name appear upon it is a party; and that where an agent or an administrator enters into a contract in his own name, he becomes personally and alone responsible. *Appleton* v. *Binks*, 4 East. 148;

Pentz v. *Stanton*, 10 Wend. 271; *Stackpole* v. *Arnold*, 11 Mass. 27; *Deming* v. *Bullett*, 1 Blackf. 241; *Bank of Rochester* v. *Monteath*, 1 Denio 402; *Thurston* v. *Mavio*, 1 G. Greene 231. We therefore conclude that judgment was properly rendered against Tryon upon the order.

Judgment affirmed.

S. Whicher, for plaintiff in error.

N. W. Isbell, for defendant.

MAGOON *v.* WARFIELD.

In the absence of fraud a decree in bankruptcy, under the U. S. Law of 1841, is a conclusive discharge of all debts provable under the law.

The failure of the bankrupt to include the name of a creditor in his schedule, or to notify him of the proceedings, in the absence of circumstances evincing the intention to deceive, will not justify the inference of fraud.

The record and decree, without the certificate, may be received as evidence of a discharge in bankruptcy.

ERROR *to Muscatine District Court.*

Opinion by GREENE, J. *Scire facias* to revive a judgment against Warfield. Defendant pleaded a decree under the general bankrupt law of 1841, showing a discharge from said judgment and other debts. Plaintiff's demurer to this plea was overruled.

This ruling is claimed to be erroneous. It is objected that Warfield did not render the name of Magoon in his schedule of creditors, nor give him notice of the bankrupt proceedings. It is also objected that defendant pleaded the record and decree instead of the discharge and certificate.

It is conceded that in every other particular the decree was regular, and it is not pretended that there was either fraud or concealment in the proceeding. A decree in bankruptcy is conclusive of the discharge, except in cases of fraud or concealment, and the omission of the bankrupt to state the name or debt due a creditor, or the failure to notify the creditor of his application for a discharge, is not evidence from which fraud can be inferred. The omission may have been by mistake, or on the belief that the debt did not exist or had been paid. In the absence of fraud a decree of bankruptcy is a conclusive discharge of all debts provable under the law. This debt was provable under the law, and it is not pretended that it was of a fiduciary nature, or that the decree was fraudulent; hence the decree is conclusive of the discharge. It was held in *Hubbell* v. *Cramp*, 11 Paige 310, that where the defendant in his answer, setting up a certificate of discharge, shows the facts necessary to give the court jurisdiction to award the decree, the certificate is conclusive evidence for the defendant, unless impeached for fraud. When jurisdiction is shown, the regularity of the proceedings cannot be collaterally questioned.

It was also held in *Hubbell* v. *Cramp*, that the omission of a creditors name in the bankrupts schedule would not exempt it from the operation of the bankrupts certificate of discharge. So also in *Fox* v. *Paine*, 10 Ala. 523; and in this case it was held that the failure to notify the creditors of his application for a discharge, in the absence of circumstances evincing the intention to deceive, is not evidence from which fraud can be inferred.

2. It is objected that the record and decree without the certificate are not evidence of a discharge under the fourth section of the bankrupt law. By this section the discharge and certificate are to be deemed in all courts, a full and complete discharge of all debts, &c. If a certificate is made evidence of the discharge, it by no means follows that the decree which awards the discharge shall not be evidence of

the fact. The one is made evidence by the act, the other is evidence *per se*. When the principal is present the substitute may be dispensed with.

It was held in *Berghaus* v. *Alter*, 5 Barr. 507, that a certified copy of the docket of entems made in a bankrupt proceeding, under the act of 1841, is evidence under that act.

In the present case the decree shows that the defendant was regularly discharged from all his debts, &c., and it "ordered that a certificate thereof be granted to him."

We conclude, therefore, that the demurrer to the defendant's plea of bankruptcy was correctly overruled.

Judgment affirmed.

W. G. Woodward and *D. C. Cloud*, for plaintiff in error.

R. P. Lowe and *J. Butler*, for defendant.

NEWCOMB *v.* STEAMBOAT CLERMONT, No. 2.

The act to provide for the collection of demands against boats and vessels, only authorizes suits commenced within one year after the cause of action accrued. This limitation is absolute and jurisdictional, and need not be pleaded.

The steamboat act is in derogation of the common law, and should be strictly construed; but still, in a manner to give full effect to the remedy intended.

ERROR *to Muscatine District Court.*

Opinion by GREENE, J. Action on a promissory note against the steamboat Clermont, No. 2. Note given by M. Littleton, captain and part owner of said boat, April 20, 1848, by which he promised for himself, for the boat, and

the owners thereof to pay A. B. Newcomb, or order, five hundred and twenty-four dollars and six cents, one day after date, "for money to outfit and furnish supplies for the use of said boat."

Proceedings commenced July 8, 1850, under "an act to provide for the collection of demands against boats and vessels." Rev. Stat. 101. The twenty-first section of the act declares that "all actions under the provisions of this act shall be commenced and sued within one year after the cause of such action shall have accrued." Under this section the defendant moved to dismiss the suit, because the record showed that the suit was barred by limitation of the statute. The motion was granted, and for this it contended that there was error in court below. It is claimed that the defendant should have pleaded the limitation, and given the plaintiff an opportunity to reply. This position could not be questioned if the twenty-first section referred to was in the nature of a limitation act, if it contained any saving clause or qualification, or if such could be legally implied from the character of the statute. But the section is absolute in its terms, and the act itself is in derogation of the common law; the one admits of no qualification, and the other of no implication. Such an action against a boat or vessel by name, is not known at common law. It is alone authorized by the statute, which should therefore be construed strictly, but still in a manner to give full effect to the remedy intended. The twenty-first section is clear in expression and free from ambiguity. Suit under the act must be commenced within one year after the cause of action accrued. Within that time only, then can a party avail himself of this extraordinary remedy. It is obvious that the legislature intended that boats and vessels should be free from such liability after one year, and that thereafter creditors could only proceed against those owning the boat at the time the liability was created.

As this wholesome restraint upon the plaintiff's right of

action is absolute, and is a condition upon which jurisdiction depends, it need not be pleaded by the defendant but should be entertained by the court on motion.

This view is abundantly supported by decisions under the pauper statute of Massachusetts, when the action was limited to two years after the cause accrued. *Townsend* v. *Billerica*, 10 Mass. 414; *Needham* v. *Newton*, 12 ib. 453; *Hollowell* v. *Harwick*, 14 ib. 186. In the last case it was held that the two year provision will be taken notice of by the court without its being pleaded, because by the statute the right of action was upon the condition that it be brought within two years after the accruing of the liability. The authorities cited by counsel for the plaintiff in error would be conclusive in his favor, if the question arose upon an ordinary limitation statute, but we think them inapplicable to the case at bar. We conclude then that the court below did not err in granting the motion.

Judgment affirmed.

S. Whicker, for plaintiff in error.

Wm. G. Woodward, for defendant.

BUDYMAN *v.* VIELE.

In a proceeding on *scire facias* to revive a judgment, defendant recovered judgment on a plea of bankruptcy, nearly three years after the case was brought to supreme court, without the plea or certificate of bankruptcy; held that as the judgment entry shows there was such a plea filed, it will be presumed that the plea was regularly filed with the certificate, and that the proceeding below was correct.

Error in the court below will not be presumed; it must be affirmatively shown.

ERROR *to Muscatine District Court.*

Opinion by GREENE, J. *Scire facias* to revive a judgment against W. D. Viele. On return of the writ, both parties appeared by their attorneys, and the defendant filed a plea of bankruptcy on which judgment was rendered for the defendant.

It is now objected that there is nothing upon which to predicate a judgment, and that the proceedings were therefore erroneous. As the clerk of the district court could find no plea of bankruptcy on file to return with the proceedings to this court, it is assumed that no such plea was filed at the trial of the cause. But the judgment entry declares that "the parties appeared by their attorneys and the defendant filed a plea of bankruptcy." There is no ground then for the assumption that the plea was not filed. Nor can we doubt the sufficiency of the plea, as the plaintiff was there by his attorney, and appears to have interposed no objection either to the plea or to the decision of the court. Had the proceedings been defective exceptions could, and doubtless would, have been taken by the attorney; as they appear to have been acquiessed in and to have slumbered, without objection, for nearly three years before the writ of error was sued out, a strong presumption is raised that all was correct, that the plea was regularly filed, and that judgment was properly entered.

It has been repeatedly decided that error will not be presumed in the proceedings of the district court; that it must be affirmatively shown in order to subject the matter to the correction of this court.

Though the record in the case is remarkable for brevity, still it discloses no affirmative error, and cannot, therefore, be disturbed. Judgment affirmed.

S. Whicker, for plaintiff in error.

Wm. G. Woodward, for defendant.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

DUBUQUE, JULY TERM, 1851.

In the fifth year of the State.

PRESENT:

HON. JOSEPH WILLIAMS, CHIEF JUSTICE.
" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

Collins & Co. *v.* Rodolph.

A mere statement of the plaintiff's cause of action sufficient before a justice of the peace, without filing the transcript of judgment, upon which suit was commenced.

A discharge under the insolvent laws of a State do not bar to a non-resident creditor who did not consent to the discharge, nor is such non-resident creditor barred from his action by having appeared and contested the proceedings in insolvency.

Error *to Dubuque District Court.*

Opinion by Kinney, J. Collins & Company sued the defendant in an action of debt before a justice of the peace,

and filed the following claim as their cause of action: "Plaintiffs claim one hundred dollars their due on judgments rendered against said Rodolph, Iowa county, Wisconsin, before John P. Tramel, a justice of the peace, in February, 1848." The same day on which the claim was filed one of the plaintiffs filed an affidavit, on which a writ of attachment was issued. On the day of trial two transcripts of judgments were filed, duly certified and authenticated, by which it appeared that two several judgments were recovered by the plaintiffs against the defendant before John P. Tramel, a justice of the peace, in Iowa county, Wisconsin. The defendant moved to quash the writ of attachment because: 1st. There was not sufficient account filed previous to the issue of said writ. 2nd. Because of the insufficiency of the affidavit. On this motion the justice quashed the writ and dismissed the proceedings at the costs of the plaintiffs. From this decision of the justice the plaintiffs appealed to the district court.

In that court a similar motion was made by the defendant, and it appears from the bill of exceptions that the court sustained the motion and quashed the writ, on the ground that the transcripts should have been filed at the time of the suing out of the writ of attachment, and that it was not sufficient to file a statement as was done in this case without the transcripts being filed at the time of the commencement of the action. This decision of the court below the plaintiffs contend is erroneous.

The statute under which the writ of attachment was issued, after enumerating the conditions upon which a writ of attachment may be sued out by a creditor, provides that "any such creditor wishing to sue his debtor by attachment may apply to any justice of the peace, who would have jurisdiction of the debt, if the suit was brought in the common form, and if the cause of action be a bond or note, shall file the same with the justice; and if it be any other

kind of a contract, shall file with the justice a plain intelligible account or statement thereof," &c. Rev. Stat. 339, § 2.

It was not necessary in this case for the plaintiffs to have filed their transcripts in the first instance before the writ could issue. The statute embraces only those causes of action which are founded on bonds or notes, and when either a bond or note constitute the foundation of the action, such bond or note must be filed with the justice before the attachment can be sued out. These being the only instruments necessary to file, it follows that if the action is based upon any other cause of action this provision in relation to notes and bonds is not applicable.

The statute cannot be extended so as to include other obligations than those enumerated. That which constituted the cause of action in the case under consideration was neither a note nor a bond, hence it was not incumbent upon the plaintiffs to file it as a condition to the issuing of the writ. The statement of the cause of action filed with the justice was in strict compliance with the statute, and consequently the court erred in quashing the writ by reason of the transcripts not having been filed with the justice before the attachment issued.

It appears from a separate transcript sent up to this court that by agreement of parties the issues of law and fact were submitted to the court, whereupon the judgment was rendered in favor of the plaintiffs upon the judgments rendered on the notes, which constituted the original foundation of the actions against the defendants. The following agreement was filed in the court below, and made part of the record: "It is agreed by the parties, in submitting this case to the court, that the plaintiffs are, and always have been, residents of Galena, Illinois, and never have been residents of Wisconsin; that the notes appended to the transcripts are the identical notes upon which suits were brought in Wisconsin, and upon which transcripts on file have been issued and judgments rendered; that the notes aforesaid

are the identical notes mentioned in the discharge under the insolvent laws in Wisconsin, a copy of part of the record of which is on file, as far as the names of the plaintiffs appear, or the interests of the plaintiffs are concerned." It appears also from a record of the probate court of the county of Iowa, Wisconsin, filed in the court below, that by a proceeding under the insolvent laws of that state that the defendant was on the 23d day of December, 1848, discharged from all his debts, including the claims of the plaintiffs in this suit, and also that the plaintiffs appeared by counsel and resisted such discharge. This discharge was pleaded in bar of the plaintiffs' action, but was overruled by the court, and decided to be no bar, whereupon a judgment was rendered in favor of the plaintiffs upon the transcripts aforesaid. This decision the defendant, by consent of plaintiffs' counsel, assigned for error.

Upon the facts presented in this case, two questions naturally arise:

1st. Will a discharge under the insolvent laws of a particular state bar debts contracted in another state, the creditor not being a resident of the state where such discharge was obtained? If not, then, 2d. Does the creditor abandon his extra-territorial immunity by appearing and contesting the discharge of the insolvent debtor?

This first question underwent an able examination in the case of *Watson* v. *Bourne*, 12 Mass. 336. This was an action of debt, brought upon a judgment rendered in the court of common pleas, for the county of Kent, in the state of Rhode Island. The defendant pleaded in bar a discharge under the insolvent laws of that state; to which the plaintiff replied, that at the accruing of the debt, and at the time of the proceeding under the insolvent laws, and the rendition of the judgment on which the action was brought, he was, and ever since had been, a citizen of the commonwealth of Massachusetts. To this replication the defendant demurred. The demurrer was overruled and the

replication adjudged good. It was held that a discharge could only operate where the law was made by an authority common to the creditor in all respects; where both are citizens and subjects. The same doctrine obtained in the case of *Mason* v. *Wash*, 1 Breeze 17. See also cases of *Burton* v. *Wallack*, 8 Pick. 186; *Witt* v. *Follett*, 2 Wend. 457; *Norton* v. *Cook*, 9 Conn. 314. A large number of authorities might be cited in support of the doctrine laid down in the case of *Watson* v. *Bourne*, but we consider it unnecessary. Wherever this question has been presented the courts, with but few exceptions, have held that debts in another state were not barred by a discharge under the insolvent laws where the debtor resides. These laws are local. They are made for the relief of the citizen, residing within the territorial limits of the state which enacts them, and they cannot be made to effect the rights of the citizens of other states. The creditor residing in the foreign state cannot enjoy the advantages which they confer, neither can he be prejudiced by proceedings under them. As he does not constitute a part of the sovereignty of the commonwealth, he cannot consent to their enactments, and is not bound by their provisions. The civil process of the court cannot reach him, nor can he be compelled by any proceeding which the state may institute to file his claims and receive a *pro rata* dividend of the assets of the debtor. The state has no right to pass any law by which the contracts of a citizen of a sister sovereignty shall be absolved, nor can any published notice affect his rights as a party to a contract in another state. The general rule is that a state bankrupt law, as it *prima facia* does impair the obligation of contracts, is unconstitutional and void, and that this effect is avoided only in case the debtor and creditor, the contracting parties, are domiciled in the state where such law already exists at the time of the contract. *Agnew* v. *Platt*, 15 Pick. 417. The territorial immunities of the citizens of one state cannot be affected or impaired by the

legislation of a state of which he is not a resident. But it may be said that a state has the right to pass statutes of limitation so as to operate upon contracts in the hands of nonresidents. If this is so, it is no argument against the doctrine here laid down. In that case the statute does not impair the *right*; it only prescribes a time in which the creditor must bring his action, and if it is not brought within the time limited, payment is presumed.

On this branch of the subject then, we have no hesitation in coming to the conclusion that the discharge under the insolvent laws of Wisconsin would not bar the plaintiff's right to recover, he being a resident of the state of Illinois, at the time the contract was made and the discharge in insolvency obtained.

We now come to the next branch of this case. Did the plaintiff's abandon their extra territorial immunities by appearing and contesting the defendant's right to a discharge? To a satisfactory solution of this question we have only to look into the authorities, which, if not so full and uniform, are still entirely satisfactory.

In the case last referred to it was contended by counsel for defendant that as the plaintiff, who was a non-resident, was one of the petitioning creditors, he made the proceeding and the discharge under it valid and effectual by his personal act, when it would not have been so by the force of law. But the court say, "it being void as a legal proceeding, his assent could not make it good as a contract *in pais* on several grounds; not as a ratification, because the whole proceeding was without legal authority and void, and there was nothing to ratify, as in *Kimberly* v. *Ely*, 6 Pick. 444; nor as a new contract, because it cannot be inferred from the act of petitioning that he intended to renounce or waive his legal rights, any further than that effect would be produced by the legal effect and operation of the proceeding itself."

Emanating, as this authority does, from a highly respectable tribunal, it is entitled to much weight. But if the plaintiffs, in the case under consideration, had *petitioned* for the discharge of the defendant, we would be inclined to the opinion that such discharge would bar the claim unless other authorities could be produced in support of the one last quoted. But it will be recollected that they appeared to oppose the discharge, and filed their objections on the ground that they were citizens of Illinois, and no proceeding in insolvency in Wisconsin could operate as a bar to their contract. But if a petitioning creditor's debts are not absolved by a discharge in insolvency in the state where he is not domiciled a *fortiori* a contesting creditor's debts certainly would not be.

In the case of *Norton* v. *Cook*, 9 Conn., 314, it was held that, although the creditor a citizen of Connecticut, with the debtor appeared in New York before the judge, by whom the petition was tried at a time appointed, and both parties were fully heard thereon, the certificate of discharge would be no bar to an action in favor of the citizen of Connecticut upon a contract made in New York. If the creditor petitions for a discharge and receives a *pro rata* share of the property of the bankrupt we are inclined to the opinion, that he could not afterwards maintain an action against the debtor on a pre-existing contract or debt. In such case the law could presume not only consent to the discharge, but a satisfaction of debt, by becoming party to the proceedings and receiving the dividend to which he was entitled.

This appears to be the purport of the decision in the case of *Clay* v. *Smith*, 3 Peters, 411, so confidently relied upon by counsel for defendant. Smith was a citizen of Kentucky, and Clay of Louisiana. The latter obtained his discharge and Smith received ten per cent., the dividend declared by the assignee of the bankrupt. Smith voluntarily made himself a party to the proceedings by petitioning

with other creditors for the discharge of Clay, and receiving his *pro rata* dividend of the assets. The question before the supreme court was, whether Smith, by voluntarily making himself party to such proceedings, had not abandoned his extra territorial immunity from the operation of the bankrupt laws of Louisiana.

The court were of the opinion that he had, and was bound by the decision of the state court to the same extent to which the citizens of that state were bound.

This decision chief justice Shaw takes occasion to review in the case of *Agnew* v. *Platt*, before referred to, in which he says that the case is very briefly reported, the facts are not fully stated, and no reasons assigned. Whether it is the deliberate decision of the supreme court or not, it cannot be an authority in favor of the defendant in this case. By adopting the decision to the fullest extent it cannot be made applicable to the facts in the case at bar.

The plaintiffs were not petitioners, nor is there any evidence that they received their *pro rata* share of the bankrupt's estate.

They contested the defendant's discharge, but by doing this they did not waive or abandon any of their rights as non-resident creditors. The case of *Field* v. *Howland*, 17 John. 65, cited by the counsel for the defendant arose between two citizens residents of the state of New York, and the only question decided was that the conduct of the plaintiff's attorney on the trial in bankruptcy was equivalent to an abandonment of his suit. The court granted a motion to set aside an execution issued after the discharge, and also a perpetual stay of the execution on the judgment.

We have not been able, after much examination, to find a single adjudged case to the effect that an appearance on the part of a non-resident creditor merely to contest the insolvent's discharge will waive his rights as a citizen of another state, or jeopardize the collection of his debts. We are, therefore, of the opinion that the court did not err in

overruling the plea of the defendant, and in entering judgment against him.

The decision of the court, quashing the writ of attachment and ordering a restitution of the property to the defendant is reversed at his costs. But the decision of the court rendering judgment upon the transcripts and notes is affirmed.

P. & J. M. Smith, for plaintiffs in error.

L. A. Thomas, for defendant.

HARRINGTON *v.* CUBBAGE.

Where a bill shows equity on its face, and is only defective in part, a general demurrer to the entire bill should be overruled.

When a bill discloses a remedy for complainant under the statutory actions of right, or of ejectment, and fails to show that the title could not be settled at law so as to prevent a multiplicity of suits, it may be dismissed.

IN EQUITY. *Appeal from Jackson District Court.*

Opinion by GREENE, J. Bill filed with a prayer to grant and secure title by decree to the S. E. ¼ of S. E. ¼ of section 13, in T. 85, N. of R. 4, E. of 5th P. M. The bill states that one Eno obtained judgment against Cubbage, Sr., in Wisconsin in 1841; and on the transcript thereof judgment was recovered against said Cubbage in Jackson county, Iowa, in June 1847, for $112 37. That in October, 1841, said Cubbage entered the N. E. ¼ of the N. E. ¼ of section 13, and in September, of that year, H. Palmer entered the land in question, and that before the entry he agreed, by bond, to convey the same to said Cubbage, and that the

consideration was paid to Palmer by Cubbage in September 1844. That execution issued on said judgment, and the two forty acre lots were sold to complainant for the sum of $150, on the 9th of September, 1847; that fifteen months having elapsed without redemption the sheriff executed to him a deed. The bill claims that Harrington is entitled to the land, that said Cubbage Sr., was, and had been before the judgments, involved in debt to a greater amount than he was able to pay; that he delayed having the deed from Palmer executed to him, for the purpose of hindering his creditors, and that with like view he pretended that his son, Geo. Cubbage, Jr., was owner of the land. That Cubbage, Sr., died in 1849, and thereafter his said son instituted suit to compel Palmer to convey to him, and obtained a decree, but that complainant was not a party to the proceeding. The bill then states that Cubbage, Jr., pretends to be the owner of the two tracts of land, and that by reason of such pretensions, and attempts to exercise rights of ownership, he has cast a cloud and doubt over his title to the premises; and concludes with a prayer that Cubbage, Jr., may be treated as trustee in regard to the land, and for a decree of title and possession of the premises to complainant.

This bill was dismissed on demurrer in the court below. Complainant now seeks to reverse this decision, and claims that there is equity in the bill, and that it is not demurable. It is true where there is a demurrer to an entire bill which shows equity on its face, and is defective in part only, that it should be overruled. But this rule cannot control the decision in this case. The demurrer is to the whole bill, and virtually alleges that it contains no averments which confer equity jurisdiction. The object sought in the bill, is to remove a cloud from complainant's title; and this object may be secured by a party *in possession* of the premises to which another person may claim title. Rev. Stat. 110, § 35. But in this case the bill shows that complainant is not

in possession, and prays that he may have possession from defendant. If complainant has title, and defendant possession under an assumed title only, it is clear that he has a complete and adequate remedy at law. There is nothing in the bill to show that the cloud upon the complainant's title could not be removed by an action of right or an action of ejectment; or that the title could not be settled so as to prevent a multiplicity of suits without the aid of chancery.

But it is argued that complainant acquired only an equitable interest in the land which he purchased under the valuation law, and that a mere equitable title cannot be enforced in a court of law. The act to allow and regulate the action of right provides that the proper remedy for recovering any interest in lands, tenements, or hereditiments shall be by an action of right. Rev. Stat. 527, § 1. The second section provides that a valid subsisting interest in the property claimed will enable a party to recover in this action, and nothing less than a valid subsisting interest would justify a recovery in equity. As the action of right extends to any interest in land it necessarily comprises an equitable interest.

We conclude, then, that a court of law is fully competent to administer justice in the premises, and that the facts alleged in the bill do not entitle complainant to the relief sought.

Decree affirmed.

P. & J. M. Smith, for appellant.

L. Clark, for appellee.

RYNEAR *v.* NEILIN.

Where a party sought to have a deed set aside on ground of fraud in a failure of payment as agreed, it was held that the deed could not be contradicted in that particular unless by competant proof of fraud in the consideration.

A contract in relation to land claims, which stipulated a penalty of fifty dollars to be paid as damages by the party failing to perform, should be enforced at law and not in equity.

A party must restore what he has received on a contract before it can be rescinded in equity.

APPEAL *from Clinton District Court.*

Opinion by WILLIAMS, C. J. An action of trespass *quare clausum fregit* was brought by Jonathan Rynear and Philena, his wife, to October term, 1849, of the district court of Clinton county, against Patrick Neilin. The trespass complained of is for entering upon the land of the plaintiffs, and cutting and taking timber. The writ of summons being duly served on Neilin, he appeared and filed his petition for an injunction to stay proceedings in the trespass case, and also for a discovery, and also praying that the deed from him by which plaintiffs claimed to hold certain land, should be cancelled and made void. Having filed his bond, with security, the injunction was allowed, and proceedings in the action at law were stayed. A hearing was had by consent, at the Judge's chambers on the 19th day of June, 1850, upon the bill and answer with the evidence in the case. The court decreed that the deed of conveyance made by Neilin to Nathan Rawlings, under whom Rynear and wife claimed, should be cancelled, annulled and held for nought; that the land thereby conveyed, should be by the decree, restored in fee simple to Neilin, and that Rynear and wife should pay the costs.

Neilin alleges in his bill, "that in February, 1844, he made an agreement, in writing, with one Benjamin S.

Rawlings, that in consideration of said Rawlings' conveying to him a certain farm, known as the Nolin farm, situated in Clinton county, he would convey to him, the said Rawlings, by deed of warranty, the south-east quarter of the south-west quarter of section No. thirty. in Township eighty-one, north of range five, east of the fifth principal meridian, in Clinton county. That in pursuance thereof, said Rawlings procured the execution, in part, of a deed of waranty from Neilin, on the 6th day of March, 1844, for the land to one Nathan Rawlings." In this transaction he charges fraudulent confederation, &c., between Benjamin S. Rawlings and Nathan Rawlings to defraud him of the land. That when executing the deed he was under the impression that he was executing it in pursuance of his agreement to Benjamin; that when he demanded of Benjamin S. Rawlings his deed for the "Nolin farm" he refused to make and execute it, but soon afterward sold and disposed of all the timber land which belonged to the Nolin farm, the chief value of which consisted therein. That he did not discover that he had executed his deed to Nathan Rawlings, until Benjamin subscribed his name as a witness thereto; that upon the refusal of Benjamin to make a deed to him for the "Nolin farm," he refused to deliver his deed of conveyance to said Rawlings, but that it was forcibly and fraudulently obtained and retained by said Rawlings and Nathan Rawlings; that he received no other consideration for said deed. That afterwards Nathan Rawlings was married to Philena Ames, and soon after died. That afterwards Philena was married to Jonathan Rynear, both of whom are made parties to the action as defendants; that said Philena, on the 7th day of March, 1849, procured his deed to be recorded; that he has had uninterrupted possession of the land, and up to the time of the recording of the deed which he made to Nathan Rawlings for said land, and since then until the 9th of October, 1849, when Rynear and wife commenced their action of trespass *quare clausum fregit*

against him for cutting timber thereon. That this action is pending in the district court of Clinton county undisposed of, and that he cannot defend it until the question of title is settled." He then concludes with a prayer for a writ of injunction, &c.

Depositions were taken in the case. From them and the exhibits, one of which is the agreement of contract between Neilin and Benjamin S. Rawlings for the exchange of lands, the following facts appear. This agreement is dated March 15th, 1844. By it Neilin stipulates to convey to Rawlings, by deed of warranty, forty acres of land, and also to convey, by quit claim deed, certain improvements then held by him. Rawlings, on his part, agreed, in consideration thereof, to deed by quit claim to Neilin, a certain tract of land known as the Nolin farm, and give peaceable possession thereof within three weeks from the date of the contract. Neilin also agreed to give him possession within the same lapse of time. The contract concludes with the following penal provision: "Either party failing to comply shall forfeit and pay to the other party fifty dollars, in good and lawful money current in the United States." The evidence further shows that Neilin took and kept possession of the Nolin farm for some time, and then sold it to one Hollis for two hundred dollars. It also is in proof that the deed from Neilin is executed to one Nathan Rawlings, and that Benjamin S. Rawlings is the subscribing witness to its execution. The deed is not acknowledged by Neilin, but is recorded. The execution was proved before a justice by the subscribing witness. It also appears from the evidence, that the timber land which was included in the contract of sale from Rawlings to Neilin was claimed by another person, by virtue of a purchase from Nathan Rawlings, by whom it was held and afterwards purchased at the public land sale; also, that Neilin continued to hold possession of, and right to, the prairie portion of the Nolin farm, on which he lived. That two years after the making of the contract

with Rawlings, Neilin sold the Nolin farm, being the prairie part upon which the improvements were, to one John Hollis for $115 00, and a mare and colt valued at $45 00. Nathan Rawlings took and held peaceable possession of the land conveyed to him by Neilin. It does not appear that the deed from Rawlings to Neilin, for the land in dispute, had been made. With this brief statement of the material facts as presented by the evidence, we will proceed to consider the law of the case.

The contract, as made by the parties themselves, after setting forth the terms upon which it was made by express provision, furnishes the means of redress in case either party should fail to comply with his undertaking. The parties themselves, thereby agreed upon the damages to be paid, upon a failure of either to fulfil his part of the contract in the stipulation of forfeiture of fifty dollars. The complaint in the bill is that Rawlings had failed to comply with the terms of his contract, in not having executed and delivered a deed for the land in dispute, as by his agreement he was bound to do, although it was demanded of him by Neilin. The fraud complained of in the bill relates to the execution of a deed by Neilin to Nathan Rawlings which Neilin seeks to avoid, upon the ground that he was deceived in the making of it; that he never made a voluntary delivery of it, and that he had not acknowledged it. There is no attempt in the bill to assail, directly, the consideration of the contract for fraud. From the testimony in the case it is evident that the title to the land in dispute, was, at the time of the contract, in the government of the United States; that it was merely "a claim" of which Rawlings claimed to be possessor or owner, without any title by purchase. This tenure is often uncertain. The deed of conveyance which he stipulated to make of it to Neilin, was to be a mere quit claim. The failure on his part, to make the deed as agreed, was to render him liable to pay to Neilin the sum of $50 00. As the consideration is not

impeached for fraud, and is expressly acknowledged as cash in the deed of conveyance from Neilin to Nathan Rawlings, it cannot be impeached for the purpose of defeating the estate thereby granted, in the manner attempted by the grantor. The fraud complained of by him is the refusal of Rawlings to convey as stipulated in the contract. He does not allege in his bill, nor does the evidence show fraud in such a manner that the consideration can be impeached and the deed thereby rendered void. The evidence goes no further than to show that the timber land was claimed and held by another person at the time he contracted for it with Rawlings; and also, that Neilin repudiated the deed after he had executed it, upon ascertaining that it was made to Nathan Rawlings instead of Benjamin. Having acknowledged the consideration of the deed to be paid, he cannot be permitted to contradict that fact by proof, so as to avoid his own solemn act, unless by competent proof of fraud. *Grout* v. *Townsend*, 2 Denio, 339, 340; *Morse* v. *Shattuck*, 4 N. H., 429; *Dwight* v. *Pomeroy*, 17 Mass., 324, 325; *McCrea* v. *Purmort*, 16 Wend., 173.

But there is another view of this case which must forever, in a court of Chancery, preclude Neilin from procuring the decree prayed for in his bill. He seeks relief here, when, by his own agreement in writing with Benjamin S. Rawlings, he, by express terms, has chosen and provided a remedy at common law, in the event of a failure on the part of Rawlings to make the deed of conveyance as stipulated. The sum of $50 was fixed as the forfeiture in damages, should either of the parties fail to perform, as agreed upon by them. This stipulation afforded him a plain remedy at law, for the wrong of which he complains. To this he was legally bound to resort. He will not be permitted to hold the land which he received in exchange for his, by the contract, for years, then sell or dispose of it for a price, and then come into a court of chancery, and procure its aid in rescinding his contract without having, within a reasonable

time, first offered to place the other party in *statu quo*. The evidence shows that he held and occupied the Nolan farm improvements for two years, and then sold them to one John Hollis for the price of $160 00. To grant the relief sought under such circumstances would be to contravene one of the plainest principles of equity. He was bound to do equity on his part by restoring the consideration received by him from Rawlings, before he could be relieved in a court of equity. The consideration which he received should have been restored within a reasonable time, if he would have the contract rescinded and rendered void in equity. On this point his case is signally deficient. He cannot be allowed to avail himself of the benefit of the contract and then call successfully upon a court of equity to rescind it. "It is a rule of equity jurisprudence that a contract will not in general be rescinded, where the contracting parties cannot be placed in the identical situation which they occupied, and cannot be made to stand upon the same terms which existed when the contract was made." *Shaeffer* v. *Sleade*, 7 Black. 184; *Galloway, Jr.* v. *Barr and Fouley*, 12 Ohio, 363; *Young, et. al.* v. *Isett*, Morris' Iowa, 469; *Masson* v *Booat*, 1 Denio, 69.

It is unnecessary to consider the points made and the positions assumed relative to the testimony, as the complainant has not presented such a case as entitles him to relief in equity. We merely say that the answer of the respondents denies the material allegations of the bill, and it is not sustained by the evidence.

Decree reversed.

Wm. E. Leffingwell, for appellants.

Platt Smith, for appellee.

Burton *v.* Burton.

In slander words are in themselves actionable, if being true they would subject the party charged to an indictment for a crime involving moral turpitude or infamous punishment.

Where the declaration charges actionable words to have been "published of, and concerning the plaintiff," it is not necessary to allege that they were spoken in the presence of some person.

Error *to Dubuque District Court.*

Opinion by Kinney, J. The plaintiff in error sued the defendant in an action on the case for slanderous words spoken. The declaration charges that the defendant on or about the 29th day of June, 1850, uttered and published in the hearing of sundry persons the following false and slanderous words of, and concerning, the plaintiff, to-wit: "My cow"—meaning said defendant's cow—"died last night." That damned rascal Bob—meaning plaintiff—poisoned her last night. Bob Burton—meaning said plaintiff—poisoned my cow last night, and she is dead." Thereby meaning that said plaintiff had been guilty of maliciously killing his, defendant's, cow. The second count in the declaration also charges that in July, 1850, the said John Burton, defendant aforesaid, did utter and publish the following false and scandalous words, to-wit: "He—meaning the said plaintiff—stole my lead. Bob—meaning said plaintiff—stole my lead"—meaning his, said defendant's, lead. The defendant demurred to this declaration, and for special cause of demurrer assigned the following: 1st. The words, in manner and form as set forth in the first count, are not actionable. 2d. There is no allegation in the second count that the words alleged to have been spoken by the defendant, were spoken in the presence or hearing of any person.

The decision of the court sustaining the demurrer is assigned for error. The question arising under the first

count of the declaration is, were the words charged to have been spoken by the defendant actionable. By our statute, if a person maliciously, wantonly, wilfully, or unlawfully wounds, disfigures or destroys any horse, ox, steer, bullock, cow, heifer or calf, he is liable to be indicted, fined and imprisoned. Rev. Stat. 187, § 15. The words charged to have been spoken by the defendant of and concerning the plaintiff, impute to him a crime under this statute, which, if true, is punishable by imprisonment on indictment and conviction. Much uncertainty has existed in the law as to when words in themselves are actionable. Various and conflicting decisions are to be found on this subject. But we believe the true rule, by which to test whether defamatory words are actionable *per se*, is to be found in the case of *Brooker* v. *Coffin*, 5 John. R. 188. In this case it is held that if the charge being true will subject the party charged to an indictment, for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable.

In the case of *Widring* v. *Oyer*, 13 John. 124, the court mention with approbation the rule laid down in 5th John, and say, "the words were clearly actionable within the rule laid down in *Brooker* v. *Coffin*, which we consider as affording the best criterion for determining whether words spoken are actionable or not. In the case of *Van Ness* v. *Hamilson* 19 John. 349, the same doctrine is maintained. And in a much later case, that of *Young* v. *Miller*, 3 Hill, the rule as laid down in the case of *Brooker* v. *Coffin* is repeated and followed, and a number of authorities in support of it, cited. In all of these cases the court went upon the ground that the words imputed a crime "involving moral turpitude," and for which the offender might be proceeded against by indictment. Governed by this well defined rule, we have no difficulty in coming to a satisfactory conclusion in relation to the first count in the declaration. The

plaintiff is charged with having poisoned the defendant's cow whereby she died. This is not only an indictable offense, but also imputes to the plaintiff a degree of moral turpitude which would render him disgraceful and morally infamous in the estimation of all worthy neighbors and citizens. There is more moral turpitude exhibited in the commission of a crime of this kind, than in one of a higher *legal* grade, and hence the accusation of it may render a man more infamous in the estimation of the public.

Homicide may be committed in the heat of sudden passion. Larceny from some supposed imperious call of nature. Perjury for the sake of shielding some friend from merited punishment. And in this higher grade of legal crimes, many circumstances may exist as palliations of moral guilt in the public mind; but no circumstances can possibly extenuate the moral turpitude of that wretch who will poison his neighbor's horse or cow. The crime charged in the first count being indictable, and involving moral guilt, the words *per se* were actionable; consequently the count was a good one, and the demurrer to it should not have been sustained. It is admitted that the words in the second count are actionable, but it is contended that the plaintiff should allege the words to have been spoken in the presence of some person.

The count charges that the defendant uttered and published of and concerning the plaintiff, that he, the plaintiff, stole his, the defendant's, lead. The defendant might have uttered the defamatory words in *secret*, but we are at a loss to know how he could have published them unless he did so to, or in the presence of some one or more persons. Publishing is defined, by an able lexicographer, to be, "making known, divulging, proclaiming." The very charge of publishing presupposes public utterance, and the additional allegation that the words were published in the presence of divers persons, would have been surplusage. The

count is good and the demurrer should have been overruled.

Judgment reversed.

Geo. S. Nightengale and *T. S. & D. S. Wilson* for plaintiff in error.

P. & J. M. Smith, for defendant.

BEEBE, *et. al. v.* ROGERS, *et. al.*

Where money was paid, upon the draft of one of three partners, but paid and used on joint account for the benefit of the firm, held that such advance might be recovered as an item in account against the firm.

ERROR *to Clinton District Court.*

Opinion by GREENE, J. Assumpsit by defendants in error, as surviving partners of the firm of A. Rogers & Co., for charges, commissions and advances made by them to J. W. Beebe and W. A. & J. E. Davidson. Cause submitted to a jury, and a verdict returned of $717 67 for the plaintiffs below.

As the account upon which judgment was rendered was in part, sustained by a written agreement made by Beebe and the said Davidson, we will briefly state its substance. The agreement was executed at Davenport, Iowa, January 15th, 1849, and stipulated that the Davidsons should purchase, on joint account with Beebe, good wheat, amounting to not over thirty thousand bushels, at prices not exceeding fifty-five cents per bushel, to be delivered to steamboats at good shipping points on the Mississippi river. The Davidsons were to purchase the wheat as much below the maximum

price as possible, and to manage the business, the sacking and the shipping with economy, and without charge. They were to share in the profits and be responsible for one half of the losses, and bear one half of the expenses and liabilities arising from the speculation. Beebe, on his part, was to furnish letters of credit from good houses in St. Louis, authorizing drafts of said Davidsons to an amount equal to twenty-five cents per bushel on purchases, as needed in payment for wheat, and the balance to be drawn for on shipment of wheat by forwarding bills of lading or warehouse receipts, with the drafts. The agreement also stipulated that a contract made between the parties in the fall of 1848, should be cancelled, and the wheat purchased under it then on hand, should be put in at cost to the new joint account; and the sum of three hundred dollars paid by Beebe to the Davidsons in the fall of 1848, should be applied to wheat purchases under new arrangement; and that a certain letter of credit forwarded by Beebe to them upon Alfred Rogers & Co., of St. Louis, should, in like manner, be used and applied in joint operation, and that the interest paid for money, exchange on drafts, and commission on sales of wheat, should be charged to joint account. Under this arrangement wheat was shipped to A. Rogers & Co., and cash advanced by them to said Beebe and Davidsons, on which A. Rogers & Co., claimed a balance of $1093 25. In the bill of particulars, filed by the plaintiff below, there is an item of one thousand dollars for cash paid on their drafts in favor of McIlvane & Happer. This draft was drawn by Beebe. The propriety of this charge is the principal question to be decided in this case. It is contended that as this draft was drawn by Beebe alone, the partnership formed by the agreement referred to, could not be made liable, as their name does not appear upon any part of the bill. This doctrine would be appropriate if the recovery in this case was sought upon the bill or draft specially. But this action is not upon the draft, nor

is the draft referred to in the declaration or sought to be enforced against the defendants. As the draft was upon the plaintiffs, and was paid by them, it was virtually cancelled. It had performed its office; it had been paid and could not be again enforced. But as the money was paid by the order of Beebe alone, the question arises, how could the Davidsons be held accountable for the amount paid? It appears by the bill of exceptions that the money raised on the draft was for the use of the defendants below, as partners, and that the Davidsons knew it was so drawn; that there had been at least one similar transaction between the parties charged in plaintiff's account, and that Beebe had, as one of the partners, acknowledged the correctness of the plaintiff's account. The facts in the case, we think, sufficient'y show that the draft was taken up by the plaintiffs on the joint credit of the defendants, and that the proceeds of it went to their joint account and benefit in purchasing wheat. The thousand dollars must be considered as funds in the hands of A. Edwards & Co., received on wheat shipped to them, by Beebe & Davidsons; or as money advanced, to aid them in their wheat operations. The fact that money was drawn upon the order of Beebe alone cannot relieve the Davidsons from their liability, if the funds were drawn and used for their mutual benefit, and on joint account; especially where the action is not upon the order, but upon the account for money advanced to defendants jointly, as in this case. The instructions given by the court below, appear to have been substantially conformable to this doctrine. We, therefore, think that the judgment should not be disturbed.

Judgment affirmed.

P. & J. M. Smith, for plaintiffs in error.

L. Clark, for defendant.

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CHAMBERS *v.* GARLAND.

To avoid the statute of limitations by proof of a new promise, the proof must be clear and explicit, and the new promise, as a new cause of action, must be unequivocal and determinate.

A promise to pay a debt in land, under circumstances which would leave the impression that the promise was made to avoid litigation and trouble, and not to acknowledge a subsisting indebtedness, will not remove the limitation bar.

ERROR *to Jackson District Court.*

Opinion by KINNEY, J. Suit brought on a promissory note. Declaration in the usual form. Plea non-assumpsit, and also the statute of limitation. Replication, setting up a new promise within six years before the commencement of the suit; upon which the defendant takes issue. Cause submitted to the court, and judgment for the defendant. The testimony embodied in the bill of exceptions is the following: The defendant, on more than one occasion, offered to pay the debt in land, and at one time offered land and fifty dollars. All these offers were within six years, and from the testimony, the court state the impression upon his mind was, that the offers were made to avoid trouble. This was all the testimony; upon which the court decided that the testimony was not sufficient to constitute a new promise, to take the case out of the statute.

According to the current of authorities, and the great preponderance of modern decisions, the court decided correctly.

Formerly the courts were inclined to view the statute of limitation with great disfavor. For a time the American decisions were against a liberal application of the statute, but the tending, especially since the leading case of *Bill* v. *Morrison*, 1 Peters 351, has been to carry into effect the

real object of the statute, and make it what it was intended to be, emphatically a statute of repose.

In the case above referred to, Judge Story says: "It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them."

Such were the views entertained by the supreme court of the United States in regard to this statute, which nearly up to that time met with little favor at the hands of the courts. To plead it, was considered dishonest, and to enforce it, that the courts were but lending themselves to prevent a creditor from obtaining a just debt. But for many years there has been great uniformity in the decisions; the courts universally regarding it as a statute of repose, and extremely careful how they let in evidence *aliunde* to defeat its purposes.

In the case of *Bangs* v. *Hall*, 2 Pick. 368, it was held, that to take a case out of the statute, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continues so; and if there has been a conditional promise, that the condition has been performed. And in the case of *Sands* v. *Gelston*, Mr. Chief Justice Spencer, in delivering the opinion of the court, said: "that if at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute. In the case of *Clementson* v. *Williams*, 8 Cranch. 72, the supreme court say: "that the statute of limitation was entitled to the same respect with other statutes, and ought not to be explained away." In that case an

attempt was made to charge a partnership, by an acknowledgement made, after its dissolution, by one of the partners when an account was presented to him that the account was due, and he supposed it had been paid by the other partner; but he had not paid it himself, and did not know of its being ever paid. It was held that this was not sufficient acknowledgment to take the case out of the statute. The chief justice in delivering the opinion of the court said: In this case there is no promise, conditional or unconditional, but a simple acknowledgment; this acknowledgment goes to to the original justice of the account; but this is not enough. It is not sufficient to take the case out of the act, that the claim should be proved, or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due. In the case of *Wetzel* v. *Bussard*, 11 Wheat. 309, the court expressly held, that an acknowledgment, which will revive the original cause of action, must be unqualified and unconditional; it must show positively that the debt is due in whole, or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new assumpsit, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt that revival is conditional, and the performance of the condition, or a readiness to perform, must be shown.

In *Bell* v. *Rowland*, Hardins R. 201, a leading case in Kentucky, the defendant made an acknowledgment that he had once owed the plaintiff, but he supposed his brother had paid it in Virginia, where the original transaction took place, in the year 1785, but if his brother had not paid it he owed it yet. The court held, that the acknowledgment was not sufficient to take the case out of the statute, that the defendant was not bound to prove that his brother had not paid the debt; that the law would imply a promise *only* when the party ought to promise; and that the defendant ought not to have promised, under the

circumstances of that case, to pay a debt which he supposed to be paid. The court say, "upon the whole we are of the opinion that the only safe rule that can be adopted capable of any reasonable certainty, is, that in order to take the case out of the statute of limitations, an *express* acknowledgment of the debt, as a debt due at the time, coupled with the original consideration, or an *express* promise to pay, must be proved to have been made within the time prescribed by the statute." See also *Harrison* v. *Handley*, 1 Bibb. 443. The plaintiff, to take the case out of the statute, produced a witness who swore that some time in May or June, 1796, he presented an account to H.,—the defendant—amounting to £250 or £260, that H. objected to certain articles in said account; and after the said articles were stricken out, H. then acknowledged that it was all right. Mr. Chief Justice Bibb, in delivering the opinion, said: "The acknowledgment from which the law is to raise a promise contrary to the provisions of the statute, must be clear and express, where the mind is brought directly to the point, debt or no debt, at the present time, not whether the debt was once an existing debt. Where the limitation has run to get clear of it, the whole burthen of proof is thrown on the plaintiff, to prove a good and subsisting debt, and a promise to pay within the period prescribed to his action. The acknowledgment of H. does not come up to this requisition. There was no express promise to pay, there was no express acknowledgment of a then existing debt, there was no assent to pay."

There are strong cases in Kentucky, but they are quoted with approbation by the supreme court of the United States, in the celebrated case of *Bell* v. *Morrison*, before cited. Whenever, therefore, the bar of the statute is sought to be removed by proof of a new promise, the promise as a new cause of action ought to be proved in a clear and explicit manner, and be in terms unequivocal and determinate. *Cambridge* v. *Hobart*, 10 Pick. 232; *Gardner* v. *Tudor*, 8 Pick. 206, *Bangs* v. *Hall*, 2 Pick. 368; 2 Greenl.

Ev. § 440. Such acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise, or intention to pay, or if the expression be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, it has been held that they ought not to go to a jury as evidence of a new promise to revive the cause of action. Angel on limitations, Ch. 21. *Stanton* v. *Stanton*, 2 N. H. 426; *Ventres*, v. *Shaw*, 14 N. H. 422; *Jones* v. *Moore*, 2 Binn. 573; *Perly* v. *Little*, 2 Greenl. 97; *Porter* v. *Hill*, 4 Greenl. 41; *Miles* v. *Moody*, 3 S. and R. 211; *Eckert* v. *Wilson*, 12 S. and R. 397; *Purdy* v. *Austin*, 3 Wend. 187; *Bush* v. *Barnard*, 8 John. R. 407.

We lay it down in short, as the established doctrine of the books, that it is necessary, in order to remove the bar of the statute, that there must be an acknowledgment of a subsisting indebtedness, coupled with a promise to pay; or with such circumstances, from which a promise to pay would naturally and irresistably be implied. With these guides before us, we have no difficulty in coming to a satisfactory conclusion in this case. Here is no proof of acknowledged indebtedness no offer to pay, except on condition that the plaintiff would take land; no evidence that the plaintiff was willing to comply with that condition, or that he demanded the land, or the land and fifty dollars; in a word, the plaintiff has not brought his case within any of the principles laid down, or the authorities cited. The debt was dead in law. It had no vitality or legal existence. It was in the eyes of the law paid, and the debtor entirely discharged. He was absolved from payment, and nothing but his own admission and promise could revive the original action. He made no such admission, gave no such promise. For ought that appears, he made the offer of land to

avoid litigation and trouble, and this appears to have been the impression made upon the mind of the court who was acting as a jury in trying the facts. We think the judgment of the court ought not to be disturbed.

Judgment affirmed.

D. F. Spurr and *Platt Smith*, for plaintiff in error.

Van H. Higgins and *T. S. & D. S. Wilson*, for defendant.

BARTON *v.* FAHERTY.

B, sold to F. a horse which had been stolen by R., and taken from F. by the owner; held that F. could recover in assumpsit the price paid for the horse, even if the thief had not been tried.

In the sale of chattels where the seller had possession, the law implies a a warranty of title, and a promise to refund is implied, if he did not own the property sold.

ERROR *to Delaware District Court.*

Opinion by GREENE, J. This was an action of assumpsit commenced by John Faherty against Isaac Barton, to recover back the purchase money of a stolen horse. By an agreement before this court, it is admitted that the plaintiff in the court below proved that Barton sold him the horse in June, 1849, and that soon after the horse was taken from Faherty by one Rose, from whom he was proved to have been stolen; that Faherty paid Barton sixty-five dollars for the horse, and that, although B. stole the horse, he had not been convicted or acquitted of such stealing. Under this state of facts it was decided, by the court below, that the

plaintiff might recover the value of the horse in this action. It is now claimed that the decision below is erroneous; that the plaintiff could not recover until the defendant had been tried for the felony; and that assumpsit will not lie, even if the plaintiff could recover in the proper action. In support of this position it is assumed that a felony cannot be made the foundation of a civil action. But is a felony made the foundation of this action? It appears that Barton sold Faherty a horse to which he had no title. In every sale of chattels, where the seller has possession of the articles and he sells as his own and not as agent for another, the law implies a warranty of title. Com. on Con. 145; 3 Black. Com. 165; 2 Kent. 478; *Defreeze* v. *Trumper*, 1 John. 274. The law is equally well settled that the purchaser may have a satisfaction from the seller if the title proves deficient.

In this case, when Barton received the money a promise was implied in law, that if he gave Faherty a horse to which he had no title that he would refund the money. It appears that Barton had no title to the horse, and that the true owner established his right to the horse and took him from Faherty; hence Faherty could recover the purchase money in assumpsit on Barton's implied promise. This civil action then is not founded upon a felony, but upon a transaction in which the defendant received money, from the plaintiff, for a horse to which the defendant had no title. The action is not commenced for the value of the horse by the owner against the thief, but it is by a third party, to recover money which had been received from him without consideration.

But under the statute of this state—Rev. St. 175, § 48—a person losing property by larceny, robbery, or burglary may maintain his action against the felon or against any person in whose possession the same may be found. May not a third person then, with much greater propriety, bring suit against the felon, not for stealing the horse, but for

having received from him money for a horse to which the felon had no title. This action cannot be regarded as merged in the felony because it is not founded upon the felonious act, but upon a subsequent and separate transaction. Hence the English authorities cited by counsel are not applicable to this case. But the doctrine is not recognized in England to the extent claimed by counsel; it is merely regarded by the English judges as against the policy of the law to permit a party who has suffered by the crime of another, to seek his remedy in a civil action, because he would be the less ready to bring the offender to justice. But this policy is not recognized by the laws of Iowa. We can find no American authority that would prohibit a party from his remedy by civil action, for an injury occasioned by the crime of another. *Boardman* v. *Gore*, 15 Mass. 331. Where the felony is punishable with death, there is some reason why the felon should not be sued in a civil action until after acquittal or pardon, for if convicted he might be executed and on the principle that all felonies include a trespass, the action would die with him. But, we think, no good reason can be suggested why an injured party may not have an action for his damages where the wrong doer is living.

We conclude, then, that the court below correctly decided that the plaintiff might recover the value of the horse in this action.

Judgment affirmed.

T. S. Wilson and *P. Smith*, for plaintiff in error.

T. Davis and *F. E. Bissell*, for defendant.

MALONY, *et. al. v.* BOURNE.

It is error to order execution on *scire facias* against a person who is not made a party to the proceeding.

ERROR *to Clinton District Court.*

Opinion by KINNEY, J. Bourne recovered judgment in the district court, against David Sleator and Aimes, his surety on appeal. Before the judgment was satisfied Sleator died intestate, and letters of administration were granted to Lawrence Malony. A *scire facias* was issued against the administrator, to show cause why Bourne should not have execution of the goods and chattels of Sleator in the hands of Malony, yet to be administered. The *scire facias* was demurred to, and the demurrer overruled by the court, and judgment rendered against Malony, the administrator of Sleator, with the proviso that no execution should issue against Sleator's estate, "but that the plaintiff should have execution against the survivor Aimes. We see no error in this judgment against the administrator of which he could take advantage. The proceeding against him by *scire facias* was authorized by the statute, and judgment was properly rendered against him as the administrator of Sleator. But we think the court ought not to have awarded execution against Aimes. He was not before the court. He was not joined in the writ, and the court had no jurisdiction over him in the proceedings then before them. True, Aimes was surety in the appeal for Sleator, and Bourne had a right to proceed against his property on the judgment which he had recovered, but this fact did not justify the court in awarding execution when he was not a party to the proceedings then pending.

The judgment, therefore, against Malony, administrator,

is affirmed, and the award of execution against Aimes reversed.

W. E. Leffingwell, for plaintiff in error.

P. Smith, for defendant.

McDaniel *v.* Plumbe.

A bill of discovery is subject to equity jurisdiction only, and cannot come up for correction of error at law.

Error *to Dubuque District Court.*

Opinion by Greene, J. Assumpsit on a promisory note. Plea, non-assumpsit, and want of consideration. Judgment for the plaintiff.

So far as the record discloses the proceedings at law we can see no error in them. But it is alleged that a bill of discovery was filed by the defendant to enable him to secure evidence in support of his plea of no consideration; that the court dismissed this bill and thereby committed error. A bill of discovery could only be entertained on the chancery side of the court; consequently, a decision upon the bill could be adjusted by appeal to this court, but could not be brought by writ of error and corrected as a proceeding at law. Constitution, Art. 6. § 3; *McPoland* v. *Fitzpatrick*, 1 G. Greene, 543.

As no error is affirmatively shown by the record in this case, the judgment below must be affirmed.

Judgment affirmed.

T. S. Wilson and *P. Smith*, for plaintiff in error.

T. Davis and *F. E. Bissell*, for defendant.

Lyon *v.* Sanders.

Parties may by agreement submit a matter in dispute to the decision of a justice of the peace, and waive the right of appeal.

Error *to Dubuque District Court.*

Opinion by Greene, J. A matter in dispute between Orson Lyon and E. E. Sanders was submitted by agreement, to the decision of a justice of the peace. The agreement stipulated that the justice should enter his decision as a judgment in his docket, upon which execution should issue without any appeal or stay of execution. A judgment was rendered in favor of Sanders for the sum of twenty-three dollars. Lyon thereupon took an appeal to the district court, where Sanders moved to dismiss the appeal, on the ground that the defendant had waived his right to appeal by agreement in writing. This motion was sustained.

It is now contended that the decision below is erroneous; that an agreement not to appeal is not binding; and that a party cannot waive an advantage given to him by law. The statute relied upon in support of this position provides that, "any person aggrieved by any judgment or decision of a justice of the peace may, in person or by his agent, make his appeal therefrom to the district court," &c. Rev. Stat. 333, § 1. Under this section it is clear that any person aggrieved may appeal from any decision of a justice; but it does not follow that a party cannot, by agreement, relinquish or abandon this right, either before or after the decision is made. Because a party has a right to an appeal it does not, therefore, follow that he *must* appeal, or that he cannot waive the right.

In this case the parties mutually agreed to submit their cause to a certain justice, with the express stipulation in

writing that the decision should be final, and that neither party should appeal. The conditions and restrictions were mutual, and applied with equal force to both parties. Where parties thus fairly agree to waive all right to an appeal, why should not that agreement be enforced.

Olive v. *Gibson*, Morris 328, is cited as authority to reverse this decision. In that case a verbal agreement was made between the plaintiff and defendant on a trial before a justice of the peace, that the verdict should be final; it was held that the agreement might be the ground of an action, if broken, but could not be a bar to the suit already in court; that the contract could not be specifically enforced in a court at law. That case differs materially from the one at bar. This was not a mere verbal agreement, nor was it entered into on the trial of the cause, but it was a written agreement and constituted the chief condition upon which the trial was to be had before the justice. If the verbal agreement in *Clark* v. *Gibson* might be enforced *a fortiori*, should the written agreement in the present case—an agreement upon which the suit was to be commenced and regulated—be enforced agreeable to the intention and stipulation of the parties?

We think the court below was fully justified in granting the motion to dismiss the appeal.

Judgment affirmed.

T. S. and *D. S. Wilson*, for plaintiff in error.

Hempstead & Burt, for defendant.

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Riggs *v.* Price.

A note for a certain sum in property not negotiable at common law; but such a note is assignable under the statute of Iowa; and when payable to *bearer* may be sued in the name of any holder.

Error *to Clinton District Court.*

Opinion by Greene, J. Action by H. Price against J. Riggs on a note for thirty-five dollars, payable to F. A. Chenoweth or *bearer*, in property at its fair value. The plaintiff recovered.

It is now objected that the note could only be sued in the the name of Chenoweth, and that it is not negotiable. It will be readily conceded that at common law this objection would hold good. But a note in which the maker "promises to pay" "any sum of money in personal property," is distinctly recognized as negotiable paper by statute. Rev. Stat. 451, § 1. And by the same section such note "shall be taken to be due and payable to the person to whom it is made," and such a note made payable to any person shall be assignable by indorsement thereon," &c. True the note in the present case was not assigned by indorsement thereon, nor was such indorsement necessary. By the express terms of the note it was made payable to any person who might be the holder, whether that person should be F. A. Chenoweth or any other person. It is in the alternative. It is to F. A. C., or *bearer*, hence any holder of the note, any bearer is made the payee—"the person to whom it is made."

Independent of our statute, we believe it to be the uniform practice in the commercial world that a note payable to bearer, may be sued in the name of the holder the same as though it had been assigned to him by indorsement, and as uniform is the doctrine that the possession of a note, payable to bearer, or indorsed in blank is *prima facie* proof

of title. 6 Mass. 451; 11 ib. 288; 3 Porter 226; 1 Baily 355; 15 Wend. 640.

Judgment affirmed.

Platt Smith, for plaintiff in error.

John P. Cook, for defendant.

McDaneld *v.* Kimbrell.

In proving a tender where the party produced the money and offered to pay the amount due on an agreement for a deed, and the other party refused to take the money or furnish the deed, without any objection to the amount offered, it is sufficiently certain without proving that the money was counted; nor need the money be deposited in court and the tender kept good.

In a case of dependent covenants, to pay money and to give a deed, it is only necessary to show a readiness to pay at the time stipulated, in a proceeding for a specific performance.

In Equity. *Appeal from Dubuque District Court.*

Opinion by Greene, J. Bill for specific performance, filed by W. A. Kimbrell against J. M. McDaneld, for a deed to land, agreeable to a written agreement.

Upon a full hearing of the case the court found for complainant, agreeable to his prayer in the bill.

To this decree the defendant urges two objections: 1. That the tender of the balance due on the land was not proved with sufficient certainty. 2. That the tender was not kept good, by depositing the money in court.

Upon the first point the amended bill distinctly avers

that complainant tendered to defendant, in land office money, the amount named in the agreement, on the day it became due, and that defendant refused to accept the money, and refused to give a deed. This averment is fully proved by two witnesses, who were present when the tender was made. They state, however, that they did not count the money nor see it counted, but that they saw the money; that it was in gold and silver, and that complainant said it was the amount called for on that day by the agreement. But still defendant refused to take the money and give the deed.

As there was no objection to the amount tendered, and as it is not pretended that there was a greater amount due, nor that the payment was not offered within the time stipulated, we cannot but regard the proof as sufficiently certain.

2. Was it necessary to keep the amount in court? There are cases depending upon a tender in which money must be brought into court, and the tender kept good. But this case is not of that character. Such a case implies an *unconditional* indebtedness by the party pleading the tender. In this case the indebtedness was conditional, and dependent. Complainant was under no liability to make this last payment on the land until defendant was prepared and willing to make the deed. These stipulations were made concurrent and simultaneous by the agreement. Both covenants are dependent, and as complainant offered and showed his readiness and ability to perform his part, and as defendant refused to take the money and denied his obligation to convey, it follows, that complainant goes into equity with clean hands, for a specific performance of the contract.

It follows then, that, as defendant was in default, as he refused to do that which would give him a right to the money, he was under no obligation to keep the amount in

court; he was only required to pay the money on obtaining title by deed or decree.

Decree affirmed.

Hempstead & Burt, for appellant.

L. Clark, for appellee.

THE STATE *v.* NEEPER.

Citizens of the town of Bellevue, are amenable only to the license law enacted for that town in 1844, for any unlawful sale of liquors within its limits.

The license law of the town of Bellevue not repealed, or to be interfered with, by the general license law of 1849.

ERROR *to Jackson District Court.*

Opinion by GREENE, J. The defendant was indicted for selling liquor in less quantity than one gallon, without a license under the general law of 1849. The indictment charges the defendant with having sold the liquor within the incorporated limits of the town of Bellevue. The court decided that the defendant was not liable under the law of 1849, for selling liquor within the limits of that town.

It is urged by the attorney for the state that this decision is erroneous. By the laws of 1844, 149, §§ 2 and 3, the trustees of the town of Bellevue are authorized to grant licenses in the town. If a person sells spirituous liquors without a license, agreeable to that law, he is liable to its penalties for the use of the corporation. The power of the the trustees over such licenses is adequate, and a party armed with their license would be authorized to sell in less quantities than one gallon, unless other concurrent laws

impose other restrictions. But it is claimed that the power conferred upon the town of Bellevue by the act of 1844 was repealed by the act of 1849, p. 84, § 6, which provides that "all acts and parts of acts now in force upon the subject of grocery, or grocery license, are hereby repealed." This repealing clause makes a clean sweep of all acts on the subject. But still, we think, there is a very marked limitation to be placed upon that construction; this repealing section is part of a general law, and should only be considered as referring to laws of a general nature on the same subject. Mere corporations, or laws exclusively local, should by no means be brought within its scope. Such a construction would be forced, it would prevent the object of the law, and would prove an unauthorized encroachment upon the rights and benefits vested in town and city corporations. Where such important sources of revenue are conferred by law upon towns and cities, even the power of the legislature, to divest them of such benefits by the most direct legislation, may well be questioned. But clearly no court of justice should favor a construction that would produce that result. As the law does not favor any repeal by implication, *afortiori*, it does not favor repeals that may impair established rights and powers. We conclude, therefore, that the Bellevue law of 1844, was in no way affected by the act of 1849.

As the town of Bellevue had the authority to grant licenses, the question arises, was a citizen of that town amenable to the general law of 1849?

Independent of the proviso to the fifth section of this law, we could readily arrive at the conclusion, that such citizen would not only be required to obtain a license from the town but also from the county. But in that section it is provided "that no provision of this act shall be so construed as to interfere with, or in any way to abridge the powers and privileges granted to cities or incorporated towns," &c. Laws 1849, 81, § 5.

It will be readily observed that if so construed as to require parties to pay for a license from the county as well as the town, such increased expense would preclude some parties from obtaining the requisite licenses, and thus the power and privileges of the town would be interfered with or abridged. This proviso shows quite conclusively, the intention of the legislature not to interfere, either by repealing clause or by penal restriction, with any incorporated town, and hence it was not intended that citizens of Bellevue should be amenable to any other than the law of 1844.

Judgment affirmed.

F. Bangs, for the State.

P. & J. M. Smith, for defendant.

Winfield *v.* The State.

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An indictment is good, if it clearly charges all the facts and circumstances which constitute the offense under the statute.

An indictment not to be quashed, or a new trial granted where dates are given in figures instead of words.

An assault with intent to commit bodily injury, not justifiable by "considerable provocation," if the circumstances show "an abandoned and malignant heart."

Where there was evidence before the jury upon every material charge and specification in the indictment, a new trial should not be granted on the ground of insufficient proof.

Error *to Scott District Court.*

Opinion by Greene, J. Indictment for an assault with intent to inflict a bodily injury. The jury found the defendant guilty, and assessed his fine at fifty dollars. The

court fixed the time of imprisonment at six months. Motion to arrest judgment and grant a new trial overruled.

It is now claimed that the court erred in overruling this motion. 1. It is urged that indictment is bad even after verdict. The only objection we can see in the indictment is its great length. It sets forth with much minuteness the circumstances and nature of the crime. It contains all that our statute requires, and an unnecessary intermixture of common law prolixity; still all the facts and circumstances which constitute the offence under the statute are distinctly stated, and that is all the law requires. But it is objected that the dates are given in figures instead of being written. It has already been decided by this court that when figures are used they do not vitiate the indictment. *State* v. *Seamons*, 1 G. Greene 418. The fact that figures are used in an indictment would not justify even a motion to quash, much less a motion in arrest of judgment.

2. It is urged that the evidence in the case shows that there was such considerable provocation, as to justify the assault, under the statute. Rev. Stat. 169 § 20. Although there might be considerable provocation, still, "when the circumstances of the assault show an abandoned and malignant heart, it would nevertheless be a high misdemeanor, under the statute, and justify the verdict. These specifications are in the alternative. If the assault is made without the one or with the other, the offence is committed; or if made without the one and with the other the offence becomes the more aggravated. There was evidence before the jury applicable to both specifications, and upon that evidence the jury found the defendant guilty.

As there was evidence before the jury upon every material charge and specification in the indictment, as it was the peculiar province of the jury to decide upon the facts proved by that evidence, and as the facts charged in the indictment clearly make out the offence, it necessarily

follows that the court below could not, with propriety, interfere with the province of the jury by setting aside the verdict and granting a new trial.

Judgment affirmed.

John P. Cook, for plaintiff in error.

Alex. W. McGregor, for the State.

DORSEY *v.* LANGWORTHY.

A sale of materials for a nine pin alley, not unlawful, and will not preclude a recovery or mechanic's lien.

ERROR *to Dubuque District Court.*

Opinion by GREENE, J. Petition filed by Langworthy against Dorsey for a mechanc's lien, to secure payment of a note given for the lumber furnished by the plaintiff for defendant's building. Plea general issue, and also that the note was given for an illegal consideration, to-wit: for lumber, &c., furnished for the building of a nine pin alley. Plaintiff, in his replication, alleged that in furnishing the lumber he did not know that it was to be used for such illegal purpose as a nine pin alley, &c. Trial by jury waived, and cause submitted to the court. Judgment for plaintiff and the lien granted.

It is now contended that this judgment, under the evidence in the bill of exceptions, is erroneous. This evidence clearly proves that the lumber was used for a nine pin alley and gambling house, and that said Langworthy knew that it was to be used for a nine pin alley. A mere nine pin

alley of itself is not unlawful. The evidence does not show that Langworthy knew the lumber was to be used for a gaming house, or any other unlawful purpose. To make good the defence it should appear that the plaintiff knew at the time of the sale that the lumber was to be put to an unlawful purpose, and that he sold it with the intention of having it used for such unlawful purpose. Chitty on Con. 638; Story on Con. § 226.

The evidence does not show Langworthy to have been *particeps criminis* in any unlawful transaction connected with the sale, and therefore, we think the court below decided correctly.

Judgment affirmed.

Wilson & Smith, for plaintiff in error.

Davis & Bissell, for defendant.

Thompson v. Maugh.

A settlement between an administrator and a creditor of the estate, the administrator gave his individual note in satisfaction, due in nine months; held that the consideration was sufficient to justify a recovery against the maker; held also, that the transaction was an admission of assets in the hands of the administrator.

The act of giving a note is *prima facie* evidence of consideration.

ERROR *to Jackson District Court.*

Opinion by GREENE, J. Maugh sued Thompson before a justice of the peace on a note of twenty-five dollars, "for services rendered to James Donaldson, deceased." Plaintiff

got judgment for the amount of the note. Defendant took the case to the district court by *certiorari*, and moved the court to reverse the judgment of the justice, on the ground that no consideration was given by plaintiff for the note. Motion overruled, and this ruling is brought up for correction as error.

It appears that the note was given by Thompson, as administrator of the estate of Donaldson, and hence it is assumed that there could be no consideration to Thompson, the maker of the note. It seems that there was a statement of accounts between the parties and that the amount of the note was found to be due from the estate to Maugh. To satisfy that claim *then due* against the estate the administrator gave his individual note due in nine months. The administrator having satisfied that claim against the estate, would, in the ordinary course of business, be likely to charge the amount over to the estate. This transaction in connection with the forbearance, in extending the time of payment, became a sufficient consideration for the note.

The nature of this transaction—the willingness of the administrator to give his own note upon a forbearance of nine months' time—very strongly implies an admission of assets in his hands belonging to the estate.

Where an administrator submits to an arbitration it has been regarded as an admission of assets. *B'k of Troy* v. *Topping*, 13 Wend. 557; 2 Greenl. Ev. § 374; Story on P. Notes, §§ 53, 181.

If a mere submission to arbitration is an admission of assets, is it not *afortiori* where the administrator gives his own obligation for the claim against the estate?

The very act of giving a note is *prima facie* evidence of a consideration, and every legal intendment will favor such consideration until the contrary is proved. In this case there is no suchcontrary proof; but there is much in all the

circumstances to favor the legal presumption of consideration.

Judgment affirmed.

F. Bangs, for plaintiff in error.

P. Smith and *J. Kelso*, for defendant.

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Bush *v.* Sullivan.

Under a parole license to work upon and prove mineral land for a share of the mineral raised, where the occupant has made expenditures in sinking a shaft and running drifts, the license cannot be revoked without refunding the expenditure, or giving the party at least six months notice. And although such parole license is within the statute of frauds, still when connected with such improvements to prove the ground, it is voidable only upon such compensation or notice.

Error *to Dubuque District Court.*

Opinion by Greene, J. Action of ejectment by J. D. Bush against M. J. and J. M. Sullivan. Plea general issue. Verdict and judgment for defendant.

We learn from the facts recited in the bill of exceptions that defendants had been in possession of plaintiff's mineral land, by virtue of an unlimited parole license, for about two years; that they had made large expenditures in proving the ground; that under the arrangement plaintiff was to have one fourth of the mineral raised by the defendants, as his ground rent, and that he had already received proceeds of his fourth of 8,240 pounds. It also appears that defendant owned lands adjoining the *locus in quo*, that one of the objects in sinking shafts and running drifts was

to get upon and prove their own land, and that in February, 1850, the parties met and agreed upon the terms of a written lease to the mining interest, that a lease was signed by the parties but not delivered; that plaintiff then read a lease which he wanted defendants to sign, by which they were to furnish him certain pasture ground at one dollar a year, but defendants object to give the pasture privilege for more than one year, therefore plaintiff declined delivering the lease which he had signed, and forbid defendants from going on or mining upon the ground from that time forth. But they continued mining on the ground from that time till in August with the knowledge, but without further objection from plaintiff. Upon these facts the court instructed the jury, that plaintiff, forbidding defendants further working or mining the ground at the time they attempted to execute a written lease, was not sufficient notice to quit.

Although defendants were in possession under parole permission only, still as that possession was authorized by the owner of the soil, and as under that license they had been induced to make expensive improvements, it would be repugnant to the leading objects of the law to recognize a notice that would give neither remuneration for the improvements nor time to make them available. True a parole lease, like the present, is at least voidable under our statute of frauds, and at all times revokable by the owner of the land; still there are principles of law and common honesty that should be observed in such revocation. Where these parole arrangements to work mineral lands on shares are of such common occurrence, and when a statute of frauds renders them so inoperative, it becomes highly important that some principles should be recognized by the courts under which gross injustice may be avoided.

If a miner has been induced, under parole license, to sink a shaft or run drifts, and if before proving the ground the license is revoked, he should have either the six months

notice recognized at common law to a tenant at will, or else the amount expended by him on the ground should be refunded. These well known principles should no doubt be recognized in cases like the present. In England it has been held that a parole license to work and improve lands, where an expense has been incurred, cannot be revoked without repaying the expenses. 8 East. 308, note 1. This important principle may well be recognized in a parole license like the present, which comes within the statute of frauds. Before declaring such an agreement void under the statute, a court should apply every appropriate principle of law to bring the parties in *statu quo*. And hence, we assume that the license in the present case was not absolutely void, as claimed by counsel, under the third section of the statute of frauds; it is only voidable. Not *ipso facto* void, but may be declared void by a competent tribunal on terms calculated to prevent fraud. If the owner of the soil desires to revoke such parole license, he should refund the expenses incurred in improvements or give such reasonable notice as would enable the occupant to secure the products contemplated for his labor and improvements.

The doctrine is well settled that a parole tenancy for farming purposes is to be considered a tenancy at will from year to year, and that six months notice to quit is necessary. The reason for this principle is that the tenant should have time to reap the crop which he had planted. Upon the same principle a parole license to sink shafts and run drifts for a share of the mineral found and raised, there is the same reason and necessity for the rule, that the minor shall have like notice to enable him to prove the range and raise the mineral which his money and industry have developed. In such a case at least six months notice should be given, or compensation for the improvements should be made.

We see nothing in Banbridge on Mines, or in any other

authority cited, that militates against this principle. We conclude, therefore, that the court below correctly charged that the notice to quit was not sufficient.

Judgment affirmed.

L. A. Thomas, for plaintiff in error.

P. & J. M. Smith, for defendant.

MILLER *v.* LANGWORTHY.

J. L. sued M. on an account that was originally due to S. M., and it was rejected by the justice because suit was not commenced by the legal party; subsequently the account was sued by S. M. for the use of J. L.; held that the first suit was no bar to the second.

ERROR *to Dubuque District Court.*

Opinion by GREENE, J. Assumpsit before a justice of the peace by S. M. Langworthy for the use of J. L. Langworthy on an account against J. E. Miller. Judgment against the defendant before the justice and also in the district court. He now seeks to reverse this judgment, on the ground that there had been a previous adjudication of the same account, which would operate as a bar to this suit.

The record shows that this same account, together with another account, had been previously before a justice of the peace, in a case where J. L. Langworthy alone was plaintiff, but this account had been rejected for the reason that it was originally due to S. M. Langworthy, and that it could be only recovered in his name for the use of J. L., and thereupon this account was ruled out. The court instructed the jury that these facts constituted no bar to this action. The

simple fact that suit had before been commenced upon this account, does not show that the matter had been adjudicated. On the contrary, in this case the record clearly shows that the account had never been passed upon by court or jury. True the account had been rejected, but not rejected because there was no indebtedness, but because it had not been sued in the name of the legal plaintiff. The account was rejected for a mere formal objection before it came to a trial upon its merits. In order to constitute a judgment bar to an action it must appear that the judgment was rendered upon the merits of the same subject matter. 1 Greenl. Ev. p. 634; 3 Phillips Ev. 384; 2 Cow. and Hill's Notes 334, N. 589. If there was a temporary disability on the part of plaintiff, or if he mistake his action, or if from any cause a matter has not been judicially passed upon, there is no bar to a subsequent action. It is only where a matter has been submitted to a court or jury and passed upon by them, that the decision will become a complete bar to another action. 6 John. 168; 11 ib. 530; 16 ib. 136; 2 N. H. 28; 4 Day 431. In this case the account had not been passed upon by court or jury; on the contrary the justice refused to pass upon this demand with the parties then before him, and rejected the account from consideration or decision. It follows, then, that the matter in dispute had not passed *in rem judicatem*, consequently there was no former decision that could conclude the present action.

Judgment affirmed.

Geo. I. Nightengale and *D. S. Wilson*, for plaintiff in error.

P. & J. M. Smith, for defendant.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

BURLINGTON, MAY TERM, 1852.

In the sixth year of the State.

PRESENT:

HON. JOSEPH WILLIAMS, CHIEF JUSTICE.
" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

CAVENDER *v.* SMITH.

In purchasing land from the United States, the party acquires absolute title from the date of the purchase or land office certificate; and from that date the land may be sold by the purchaser, and is as subject to judgment execution and sale before the date of the patent as it is after.

A government patent for land relates back to the date of the purchase, and is evidence of title in the patentee from the date of the certificate of purchase, and not from the date of the patent.

Land held under a certificate from any land office subject to execution.

Land office receipt or certificate made evidence of legal title, by statute.

Title acquired under execution sale cannot be defeated by execution defendant, on the ground that his patent for the land bore date subsequent to the sale.

ERROR *to Des Moines District Court.*

Opinion by GREENE, J. An action of right by John Cavender against Jeremiah Smith for the west half of the south-east quarter of section six, in township sixty-nine north, range two west.

The plaintiff gave in evidence the duplicate of the register of the Fairfield land office, which certified that the land was purchased from the government of the United States, January 16, 1840, by Jeremiah Smith. He also introduced to the jury a judgment of the district court of Des Moines county, rendered on the 17th February, 1840, for the sum of two hundred and thirty-four dollars, in favor of Smith Brothers & Co., against said Smith. He then read in evidence an execution issued on said judgment, with the levy and return; and also a deed from Cameron, sheriff, dated June 13, 1841, conveying the land in question to James W. Grimes, by virtue of said execution; also a deed dated October 28th, 1843, from J. H. McKinney, the then acting sheriff of said county, which was executed by virtue of the same execution to said Grimes; and also a deed from said Grimes to the plaintiff, dated May 31, 1843. He also gave evidence to show that Smith was in possession of the land at the commencement of the suit.

It appears that the defendant then offered in evidence, by way of defence and to show title in himself, acquired since the judicial sale of the premises, a patent from the United States for the land in controversy. The patent is dated December 1, 1841. To the introduction of the patent for that purpose the plaintiff objected, but the court permitted it to go to the jury as evidence, and instructed the jury that the patent shows the legal title to the land in question was in the defendant at the commencement of the suit; and that

the legal title must prevail over all others in this action. Thereupon the jury returned a verdict for the defendant.

In admitting the patent for the purpose specified and in giving the instruction to the jury, it is contended that the court below erred. In deciding this case it may be well to inquire what rights were acquire by the execution purchaser under the judgment and sheriff's sale. He could acquire no greater right than was vested in the judgment debtor. Before judgment was rendered against him Smith had purchased the land from the United States, and had obtained the usual receipt or certificate of purchase. By this purchase he acquired all the property which the United States had in the land. There was no reservation made. The sale was unconditional; the right acquired was absolute. All the equity, and in fact the legal title passed from the government to the purchaser. The government retained only the formal—the merely technical legal title in trust for the purchaser until the patent issued. This view is fully sustained in *Carroll* v. *Safford*, 3 Howard U. S. 441, 460. In that case the court held that, "where the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent. It is true if the land had been previously sold by the United States or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee." This decision also holds that the land so purchased is, before the patent issues, real estate in the hands of the purchaser; that it descends to his heirs, and does not go to his executors or administrators; that "in every legal and equitable aspect it is considered as belonging to the realty;" and that such lands may be taxed as real estate, "as lands owned by non-residents." The opinion distinctly declares that lands which have been sold by the United

States can in no sense be called their property. So far as the property and the rights of the purchaser are concerned, they are as fully protected under the certificate as they can be under the patent. Having once sold the land by certificate to one, the officers of government could not sell it again and convey a good title to another, even by patent. In reality the purchaser was vested with the entire ownership by his certificate, and therefore, the patent could not invest him with any additional property in the land; it only gave him better legal evidence of the title which he first acquired by certificate. When he paid the purchase money to the receiver of the land office he had performed on his part all that was required, by the conditions of sale, to perfect his purchase, and he at once acquired all but the mere evidence of a technical legal title which was retained by the United States in trust for him till the patent could be issued. The purchaser could sell and convey the land as completely before he obtained the patent as he could after. And such was the right of Jeremiah Smith to the land in question, at the time of the sale under the judgment execution and sheriff's deed. The entire subsisting interest of Smith, passed by that sale to Grimes as completely as if the transfer had been by voluntary conveyance. But it is contended that the legal title subsequently acquired by Smith, when he obtained the patent from the United States, did not inure to the purchaser as it would have done if the conveyance had been voluntary. We have already noticed that Smiths right to the land, in substance and in fact, resulted from his purchase and not from the patent which was subsequently issued, and that the patent was only legal evidence of that right. It follows, therefore, that the patent could not be in conflict with the right, but rather contributed to its support and confirmation. Smiths property in the land and his right to the patent, as evidence of that property, were simultaneously acquired by the same purchase. The consideration money which secured the

certificate gave him, at the same time, a right to the patent. As emanations from the same source, the relation between them cannot be legitimately severed. They come from the same purchase, they convey the same property, contribute to the same object, and the one must relate back and perform the other. In what respect, then, can they be regarded as antagonistic? The fact that the patent bears date long subsequent to the certificate of sale, is no evidence of a subsequent purchase. On the contrary, it purports to have issued by virtue of the prior sale, payment and register's certificate. There could have been no subsequent purchase from the government after a valid sale, and consequently no subsequently acquired property, nor even a subsequent evidence of legal title, but such as related back to the regular purchase, and must inure to the grantee under the sheriff's deed.

If a patent issued to the execution defendant subsequent to the sheriff's sale, could be set up as evidence of subsequently acquired title in such defendant, for the purpose of defeating the sheriff's deed, it is obvious that title could not be acquired by judicial sale of lands held by a land office certificate, and thus the statute authorizing the sale of such lands would be defeated, and execution purchasers deprived of their rights. The execution law, under which the land in question was sold, expressly declared that lands under a certificate from any land office should be subject to execution. Laws of 1858–9, p. 197. It was argued, and will not be disputed, that a patent is paramount to a register's certificate, and a better evidence of legal title in the patentee. But this rule has no bearing upon the present case. There is no conflict between the two; they establish the same title. And under the statute of 1842, p. 38, the usual duplicate receipt of the receiver or the certificate of the register of the proper land office, is made sufficient *prima facie* evidence of title, or of right of possession in actions of trespass, actions of right, or other actions at law or

equity, and such a receipt or certificate is declared to have the same effect in establishing a possession at law as is given to a deed of conveyance or patent. Under this statute a receipt or certificate is made evidence of title in an action at law, and in establishing a possession it has the same effect as a patent. Thus additional importance is given to land office receipts and certificates as evidence of legal title, in which they have the same effect as a patent, and virtually vest the conclusive legal title in the purchaser from the date of the certificate.

But, independent of this statute, the admission of the patent for the purpose specified and the instructions given in relation to it, were manifestly erroneous upon the doctrine of relation, which is clearly applicable to the case. This must appear incontestable under the rule in 5 Cruise on Real Prop. 510, 511, "that all the parts and ceremonies necessary to complete a conveyance, shall be taken together as one act, and operate from the substantial part by relation." This "substantial part" is recognized in Vin's Ab. tit. Relation, 291, as "the original act" which is to be preferred, and to this, all subsequent acts are to have relation. This doctrine of relation appears to have been often applied to the adjudication of real actions by American courts.

In *Johnson* v. *Stagg*, 2 John. 510, a lease for nineteen years and nine months, executed August 1, 1795, pursuant to a prior parole agreement for a lease of twenty years, was considered as relating back to May 1, so as to make valid a mortgage executed by the lessee on the 6th of May, 1795. The opinion in the case by Kent, C. J., declares that a conveyance will, in many cases, be deemed to relate back to the time when the agreement for it was concluded, and render valid any intermediate disposition of the land.

In *Jackson* v. *Dickinson*, 15 John. 309, the land of A. was sold under an execution at the suit of B. on the first of March, and on the tenth a mortgagee of the land filed a

bill of foreclosure against A. and B., and on the nineteenth a sheriff's deed was executed to the purchaser; and it was held that the subsequent delivery of the deed was mere matter of form, and must have relation back to the time of sheriff's sale; and that the purchaser's title was acquired before the bill was filed; and that he might contest the validity of the mortgage in an action of ejectment.

A grant by the proprietary of Maryland of escheat land relates back to the original grant, and where such grant covered lands in which he had a reversionary interest, it will operate to pass such interest. *Howard* v. *Moale*, 2 Har. and J. 249.

It was held in *Jackson* v. *Ramsay*, 3 Cowen 75, that a deed given by a sheriff upon a previous sale on execution relates back to, and in judgment of law, is executed at the time of sale.

This doctrine was also recognized in *Jackson* v. *Bull*, 1 John. Cas. 81; *Case* v. *De Goes*, 3 Caine 262; *Jackson* v. *Bard*, 4 John. 234; *Heath* v. *Ross*, 12 ib. 140. The same rule prevailed in *Rogers* v. *Brent*, 5 Gilman 573. In that case the judgment was recovered against A., while he held land under his certificate of entry from the United States. The land was sold on execution. After the sale, and before the time of redemption expired, A. assigned his certificate of entry to B., who obtained a patent from the United States and then conveyed the land to C. In ejectment, brought by C., it was held that the sheriff's deed related back to the judgment, and made a complete transfer of A's title; that the assignment from A. to B. only passed the right of redemption, and as this right was not exercised, the assignment to B. was void and the patent issued upon it fraudulent, and conveyed no title to the patentee against the claimant under the sheriff's deed.

The same principle has been repeatedly enforced in the supreme court of the United States, and carried to a much greater extent than is necessary in the adjudication of the

present case. In *Stoddard* v. *Chambers*, 2 Howard 316, a concession was made to B. in 1800; in 1804, B. quit-claimed to M., and in 1805, M. quit-claimed to S. The claim was filed with the board of commissioners in 1808, and confirmed to B. and his legal representatives in 1836. It was held that the legal title was vested in B., and inured by way of estoppel to his grantee and those who claimed by deed under him. And in *Bissel* v. *Penrose*, 8 How. 317, the same principal was maintained.

But the case of *Landes* v. *Brant*, 10 How. 348, broadly asserts the doctrine of relation, and clearly settles every point raised in the case at bar. In that case a Spanish claim of land was acquired by Clamorgan under Dodier, the original claimant, by virtue of ten consecutive years possession prior to December 20, 1803. Such claim was authorized by act of congress. Clamorgan was entitled to a patent by virtue of a certificate of confirmation made by commissioners Nov. 13, 1811. His petition for such confirmation was filed in December, 1805. In 1808 judgment was recovered against Clamorgan, the claim was sold and a sheriff's deed executed to McNair. It was held that the execution sale passed to the purchaser all the title that could have passed from C. to M. by a quit claim deed; that "applying the doctrine of relation and taking all the parts and ceremonies necessary to complete the title together *as one act*, then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act; that of filing the claim in 1805. On this assumption, intermediate conveyances made by the confirmee or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title and pass that title to the alienee. And on this ground the deed made by the sheriff to McNair is valid."

Under these views and authorities, we think no doubt can be entertained that the court below erred in admitting the

patent and in giving the instructions, as set forth in the statement of this case, to defeat the sheriff's deed.

Judgment reversed.

H. W. Starr and *J. C. Hall*, for plaintiff in error.

David Rorer and *M. D. Browning*, for defendant.

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BROGHILL *et al. v.* LASH, *Ex.*

Service of notice to defendants must be complete ten days before the appearance term; if the notice is given by publication, the four weeks' notice required by Code, § 1725, must have been published ten days before the term at which judgment is rendered.

Under the Code where service of notice has been made by publication only, default should not be entered, without proof that a copy of the notice was directed to defendant, or that his residence could not be ascertained. After such notice and default, the proof will not be presumed; it should appear of record.

Where a decree by default charges an indebtedness upon land in which a co-defendant not defaulted is interested, such co-defendant may show that the decree was unauthorized.

IN EQUITY. *Appeal from Henry District Court.*

Opinion by WILLIAMS, C. J. This is a proceeding by petition under the code instituted by Smith in his life-time, who died pending this suit, and Lash, administrator, was substituted. The petition sets forth that plaintiff on the 15th of October, A. D. 1850, sold to Broghill a house and lot in the town of Mt. Pleasant, Henry County, Iowa, for the sum of seven hundred dollars. The sum of two hundred and seventy five dollars was paid to the plaintiff at the time of the purchase by Broghill, and the plaintiff then executed to him a title bond for the premises, by

which he bound himself to make and deliver to Broghill a deed, conveying the title thereto in fee simple upon the payment of two promissory notes then given for the balance of the purchase money. The first note being for the sum of two hundred and twenty-five dollars, with ten per cent. interest from date, payable on 15th October, 1851. The second for two hundred dollars with like interest, payable 15th October, 1852.

Upon the maturity of the first note and before that of the second, this action was commenced. The petition shows that Broghill had assigned the title bond which he received from plaintiff to Asbury B. Porter.

After alleging that Broghill had left the State and that Porter refused to pay the money due on the note he prays the court for "an order and decree that defendants shall perform their contract, or that their interests may be foreclosed in the premises; and the property sold to pay said note, subject to the remaining note, which becomes due and payable on the 15th day of October, 1852, as aforesaid."

The record shows that service of process was made, personally, on Porter, but that Broghill was not found in the county—and publication, as in the case of a non-resident, was made.

At the March term, 1852, Porter appeared and filed a demurrer to plaintiff's petition. The demurrer was overruled. He then answered, denying the allegations of the petition. Default was entered against Broghill. The court then entered a decree against Broghill for the two hundred and fifty-seven dollars and forty-nine cents, and costs, and also that all the right, title and interest of Broghill & Porter, in the lot of ground, &c., under the title bond be sold, as in a case of mortgage foreclosure, &c.

Objections are made to the proceedings of the district court upon the ground that the default, as entered against Broghill, was not obtained in accordance with the requirements of the statute, and that there could be no valid

judgment entered thereon, there being no personal or constructive service of process upon him.

The return of the Sheriff shows that the defendant Broghill was not found in the county. With a view to service, publication was made, in the "Iowa True Democrat," a weekly newspaper published in Mt. Pleasant, in Henry county, of notice of the pendency of this suit. Proof of this publication was made on the 15th day of March, 1852, before the clerk of the court, being the first day of the term thereof. The attorney, Mr. Beers who proved the publication of the notice states in his affidavit that it had been "published for more than four consecutive weeks *last past.*"

It is contended by the appellant that this notice, as proved, was not such as to warrant the court to proceed to trial at that term of the court. By a careful examination of the enactments of the Code on the subject of service, we think this objection is well taken.

There are two modes of service provided by the Code, the one is by service on the person, as resident within the jurisdiction of the court, and the other is in the case of a non-resident, by publication. The first is made "by reading the notice to the defendant, and giving him a copy, if demanded. If not found he may be served by a copy left at his usual place of residence, with some member of the family more than fourteen years of age." Code, p. 252, § 1721. Service by publication is prescribed as follows: "Upon a return of 'not found,' as to all or any of the defendants, service on such defendants may be made by giving notice of the commencement of the action for four weeks successively in some newspaper printed as convenient as practicable to the court wherein the suit is pending, to be determined by the clerk of the court." Code, § 1725. Then after these provisions as to the mode of service, it is further enacted that "Upon being served with notice in either of the methods herein before

prescribed, the defendant shall be considered in court. Code, §. 1730.

In the first place, it is apparent that the service, in whatsoever manner made, must be complete ten days before the next term thereafter, to enable the plaintiff to procure judgment. Code § 1720. The notice itself is without date, and the proof of service in this case is made on the first day of the term to which the process was made returnable; and is, that notice, &c., was published "*for more than four consecutive weeks last past.*" This being the only evidence of the time during which the publication was continued; and nothing to establish a complete and legal service on Broghill, ten days before the term at which judgment was rendered, the procedure was erroneous. After examining the several provisions of the Code on the subject of service, we have been led to the conclusion that such is the manifest intent of the legislature. Any other construction would bring a party defendant into court without proper time and opportunity to prepare his defense.

But, there is another objection to the service on Broghill, which we consider conclusive against the plaintiff below, and must reverse the decree of the district court. This objection is raised upon the provision of the Code in relation to defaults, which is as follows, "where service has been made by publication only, and no appearance had, default shall not be entered until proof has been made that a copy of the petition and notice was directed to the defendant, through the post office, at his usual place of residence —stating the place—in sufficient time for his appearance, or that such residence is unknown to the plaintiff, or his attorney or business agent, and could not, with reasonable dilligence, be ascertained." Code, § 1826. In the case at bar the plaintiff failed entirely to comply with this provision of law. Without such compliance the default could not be entered legally.

Without a service on the defendant in one of these modes,

as prescribed by the statute, the district court could not acquire jurisdiction of his person. The statute directly prohibits the entry of the default until this proof of the mailing of the notice, &c., has been made to the court; until this was done defendant was not in court. It is contended by the counsel for appellee that the jurisdiction of the district court being general, this court will presume that the necessary proof, as required by the statute, was made, and that the proceedings were all correct. To sustain this position the case of *Wright* v. *Marsh, Lee & Delavan*, 2 G. Greene 109, and 1 G. Greene 78, 158, 250, are cited. These cases recognize a well established principle of jurisprudence. That where a court of record, possessing and exercising powers of general jurisdictions, has passed upon the rights of parties by judgment, it will be presumed that such court acted, in the matters involved, legally, and there can be no judicial inspection behind the judgment, save by appellate power. We think this case is not affected by that principle; this is a direct proceeding, by appeal, in chancery. The question presented for adjudication is not of irregularity in the procedure of the court below, but of jurisdiction of the person of the defendant. It goes to the power of the court to try, determine and pass the judgment. Much might be said of the propriety, nay, necessity, of guarding carefully the rights of persons whose interests are disposed of by summary, stringent, and *ex-parte* legal procedure; but here it is deemed unnecessary, as we think the provisions of the Code are such as to furnish the most ample evidence of the intent of the legislature on this subject. The *proof* required, where service has been made by publication only, and no appearance had, is clearly made a condition precedent, without which the court had no power to enter the judgment by default. It is a jurisdictional fact upon which, by the statute, the power of the court to act is made to depend, and should appear of record in the case. In the stead of personal and actual service, and a return

thereof into court, by virtue of which the court acquires jurisdiction of the person of the defendant, it is a mode of service by construction provided by legislation to be used in proceedings mostly *ex-parte*, and hence the reason of the strictness of the provision. The proof required is made an element of jurisdiction by the statute, and the record should show that it had been made before the default was entered. 9 Howard R. 348–9.

The allegation that Porter has no right to complain here, of the judgment by default, against Broghill, is not maintainable. The proceeding is by bill, as in chancery, to foreclose against both Broghill and Porter, as defendants. It seeks to procure a decree for the indebtedness of Broghill, and to charge the estate purchased by Porter from him; and also, that this estate be seized in execution of the decree, and sold to pay that indebtedness. This is the decree entered by the court below. It is only by the judgment entered against Broghill that the rights of Porter are affected, as he stands related to the parties. He, therefore, being a party in interest, and to the proceeding of record has a right to complain. It is the province of this court, as well as its duty, to adjust the equitable rights of the parties to the action. Upon this point see *Marshall* v. *Marshall*, 2 G. Greene, p. 241.

Decree reversed.

J. C. Hall and *C. H. Phelps*, for appellant.

D. Rorer, for appellee.

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Marshall *v.* McLean.

A particular description in a deed ought not to limit the grant made certain under a general description, unless it can be clearly ascertained from all the words used that it was the intention of the parties to restrict the grant by the particular description.

Where there is ambiquity on the face of the deed, the construction should be most favorable to grantee.

A judgment of partition is matter of public record, and where a recorded deed refers to such judgment and conveys all the land designated under a certain described share in said partition, it amounts to full notice of all the land or lots comprised in such described share, even of such as might be omitted in a particular description given in the deed.

Where land was first sold in satisfaction of a junior judgment, and then subsequently sold to satisfy a senior judgment; held that the sale under the senior judgment should prevail.

Appeal *from Lee District Court.*

Opinion by Kinney, J. Action of right brought by Marshall to recover possession of lots one and two, in block No. ten, in the city of Keokuk. Plea denying the right to recover judgment for defendant. From the bill of exceptions taken by Marshall it appears that to sustain the action he introduced, first, the record of partition in which lot one was allotted to Charles Thompson, and lot two to John H. Lines. He then offered in evidence a deed from said Lines dated April 23d, 1850, conveying said lot two, to William Stotts, and deed from Stotts of date October 5th, 1850, conveying said lot to plaintiff. This is the source and chain of title to lot two.

To sustain title to lot one, the plaintiff offered in evidence the records of the district court of Lee county, containing a judgment for costs in said partition suit, together with execution against said Thompson, and the return thereon, by which it appeared that said lot one was sold to Hawkins Taylor on the 27th day of May, 1843, and a deed from William Stotts, sheriff of said county, dated

June 20, 1843, conveying said lot one to said Taylor, all of which were admitted without objection. Plaintiff then offered in evidence the record of a judgment in said court, dated April 23d, 1846, in favor of George Donnel vs. said Taylor, and execution and return thereon, which showed that said lot one was sold to William Stotts on the 2nd day of September, 1848, for which a deed was made by Peter Miller, sheriff, to said Stotts, dated December 4, 1848, conveying said lot one to said Stotts. Stotts sold to plaintiff by deed of date October 5, 1852. Upon the introduction of this evidence plaintiff rested his case.

Defendant then offered in evidence a deed from said John H. Lines dated November 1, 1844, conveying certain lands to Hugh T. Reid which after reciting the consideration, &c., reads as follows: The said parties of the first part "do by these presents convey, remise, release, and forever quit claim unto the said party of the second part all the right, title and interest which was acquired by the parties of the first part or either of them in and to the lands set apart and allotted to the said John H. Lines in the half breed Sac and Fox Reservation in said county by a decree of the district court of said county making partition of said lands and being designated in said decree of partition as share number thirty-seven, and all the title which the said parties or either of them have in and to said lands by virtue of any tax title or tax sale, as well as all the right, title and interest acquired by the said parties of the first part or either of them, by virtue of any conveyances of the half breed Indian or half breed Indians, by, through, or under whom the said John H. Lines claims in said decree of partition to derive his title to an interest in said half breed lands. The said lands allotted to said John H. Lines in said decree being more particularly described as follows, to-wit:" Here follows a description of a number of pieces of land and a large number of lots in the city of Keokuk in which lot No. two in block No. ten is omitted.

The defendant also introduced a deed from said Reid, dated July 3, 1848, conveying to him said lot two. The plaintiff objected to the introduction of the deed from said Lines to said Reid on the ground that said deed did not convey any portion of the land in controversy, but this objection was overruled by the court, and the deed admitted in evidence.

The defendant also offered in evidence a deed from Hawkins Taylor to L. R. Reeves dated September 17, 1847, conveying said lot one to said Reeves, also a general warrantee deed from said Reeves to Jesse Seely and Jehue Stewart dated September 1, 1847, conveying said lot one, and warrantee deed from Seely and Stewart of April 22, 1848, conveying said lot to defendant.

The defendant then offered in evidence the record of a judgment in the district court of Lee county rendered on the 7th day of May, 1844, in favor of Hood & Abbott vs. Hawkins Taylor, also the records of said court dated April, 1850, reviving said judgment, and also an execution issued October 16, 1850, on said judgment, and the return thereon, which showed that said lot one was sold by virtue of said execution to defendant. A sheriff's deed was duly executed of date 7th December, 1850, conveying said lot one to said defendant. Upon this the defendant rested. Whereupon the court decided that the evidence established the title to said lots in the defendant and gave judgment accordingly.

Marshall appeals, and assigns for error,

1st. That the court erred in admitting the deed from John H. Lines and wife to Hugh T. Reid in evidence.

2d. The court erred in deciding that the evidence established title to the lots in controversy in defendant and in rendering judgment accordingly.

The record presents two questions for adjudication.

First. Did the title to lot two pass with the other property by virtue of the conveyance from Lines to Reid.

Second. As both plaintiff and defendant respectively claim under Hawkins Taylor as the source of title, the plaintiff by virtue of judgment against Taylor obtained in 1846, and sheriff's deed in 1848—and the defendant by virtue of a judgment in favor of Hood & Abbott recovered in 1844, a revival of said judgment, execution, sheriff's sale and deed in 1850—did the title pass to plaintiff by virtue of a senior execution, levy, sale, and deed, upon a junior judgment.

These questions we will briefly consider in their order.

Lines and wife in the general description convey, remise, release, and forever quit claim, to Reid all the right, title, and interest which was acquired by them or either of them in and to the lands set apart and allotted to the said Lines in the half breed Sac and Fox Reservation in Lee county by a decree of the district court of said county making partition of said lands, and designated in said decree as share thirty-seven.

This description is perfect within itself, and sufficient to pass the title without particular reference to the land and lots specially set forth in share thirty-seven. If the description had ended here, there would have been no doubt but that all of share thirty-seven would pass by the conveyance. We have, then, only to enquire into the evident intention of the parties in making the description more definite and certain. Was it to restrict the grant made clear and unambiguous in the general description, or merely to refer more particularly to the land and lots designated in share thirty-seven? Evidently the latter, because the parties expressly say "the said lands allotted to said John H. Lines in said decree being more particularly described as follows, to-wit." In this description lot two is omitted; not from the conveyance, but as not being contained in share thirty-seven. What does this establish? That the parties intended to exclude it from the conveyance? Not at all; but merely that in giving a description of the property set forth in

share thirty-seven, they inadvertently omitted lot two in block ten. In *Bott* v. *Burnell*, 11 Mass. 163, it is laid down as a general rule "that a construction shall always be made of words, if it can be, to support that which seems to be the intent of the parties; and that general words are not restrained by restrictive added *ex-majori cautela*, or by affirmative words more restrictive, but which have no tendency to render a general description ambiguous or uncertain." And in *Jackson* v. *Clark*, 7 John. 216, in construing a deed, Judge Spencer well said "that the rules which govern the construction of grants have been settled with the greatest wisdom and accuracy, and that the following principles should govern. Such construction is to be given as will give effect to the intention of the parties, if the words they employ will admit of it, *let res magis valeat quam pereat.* If there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant."

Applying these sound and well digested principles to the case before us, we have no difficulty in giving a construction to this grant, so as to pass the title to the lot in controversy to Reid. A particular description should never control a general one, unless the object is to render that which is general and uncertain more specific, definite and certain. Such particular description ought never to limit the grant made certain by a general description, unless it can be clearly ascertained, from all the words of the grant, that it was the intention of the parties to restrict the grant by the particular description. Again, when there is ambiguity on the face of a deed, it is well settled that such construction must be given as will be most favorable to the grantee.

In this case we are not driven to this last rule of construction, as the intention of the parties is apparent on the conveyance—free, as we think, from all uncertainty. The

general description relative to the conveyance is not restricted by particular words, nor do the grantors limit the grant by omitting lot two in the recital of lands contained in share thirty-seven. All of that share, as we have said, was conveyed by the general words, and the omission is not inconsistent with the grant, nor does it render it less certain, and hence should not frustrate the conveyance.

But it is said Marshall had a right to purchase lot two upon the faith of the particular description in the deed, and that this alone was notice of the property actually conveyed. In reply to this we say, first, that he was bound to look to the whole instrument, that he was presumed to know the law, and the legal effect of the general words of conveyance; and second, that the decree in partition was of public record, and the law will hold him to notice, as share thirty-seven was conveyed, and lot two included in that share. In either point of view he purchased with full notice that Lines had no interest in lot two, and in this particular occupies the same position that Lines would occupy were he contesting the title of Reid to said lot. The deed from Lines to Reid was properly admitted as evidence, and the decision establishing the title to lot two in the defendant, Reid's grantee, is correct.

In relation to lot one, it will be seen that Taylor obtained a sheriff's deed June 20, 1843. May 7, 1844, Hood and Abbott obtained judgment against Taylor; April 23, 1846, Donnel obtained judgment against Taylor; September, 2, 1848, the lot was sold on the Donnel judgment to Stotts, deed made to him December 4, 1848, and conveyance to plaintiff October 5, 1852. In April, 1850, Hood & Abbott revived their judgment; October 16, 1850, execution issued, said lot sold to defendant, and deed made December 7, 1850. It is now contended by the plaintiff that the sale on the Donnel judgment will hold the lot; that although the judgment is junior to the Hood & Abbott judgment, yet as they were not diligent in asserting their

rights, they lost their lien. The statute in force at the time Hood & Abbott obtained their judgment, made all judgments liens upon the real estate of the defendant, from the day of the rendition thereof. R. S. p. 271, § 6. This statute does not limit the time during which such lien shall continue. The legislature, by act approved January 19, 1846, limited the liens of judgments to ten years. This act is made applicable to judgments which were then rendered, evidently so from the plain and obvious import of the language, as well as from the fact that prior to its becoming a law, the lien was unlimited, and hence mischievous in its consequences and required a remedy—*vide* similar decision in *Woods* v. *Mains*, 1 G. Greene, 275. Under this statute Wood & Abbott had a right, any time within ten years from the date of the judgment, to assert their lien. The judgment lost none of its efficacy by lying dormant. It was still a lien upon the property of the defendant, and all junior incumbrances must be postponed until it is satisfied, if enforced within the time limited by statute. The judgment was revived, but this did not revive the lien, because the lien was not extinct. It only gave a remedy to enforce by execution, a lien which was never lost. At common law, land in general was not liable for debt, nor could any execution issue on a judgment, in a personal action, after a year and a day. 2 Bac. 728. The judgment, however, was not barred, for an action of debt would lie on it. The statute of West. 2, 13 Edw. 1, authorized the *elegit*, and thus made land in England liable for debt from the time of the judgment. 3 Bl. Com. 418. It also gave the *scire facias* in personal actions, by which, after a year and a day, the judgment might be revived, as in real actions at common law. Co. Litt. 290. This being the law in New York in 1802, we find the following case in point: In February, 1802, Ehl had judgment in debt against Borst, whose land was, thereupon, sold in June, 1802, to Ellwood. Afterwards an old judgment of 1798, in favor of *Kane* v. *Borst*,

was revived by *scire facias* in December, 1803, and the same land levied upon and sold to Kane. The claimant under Ellwood, who purchased under the younger judgment, brought ejectment against the lessee of Kane, who purchased under the prior judgment. It was determined that the plaintiff could not recover. The language of the court is as follows: "If the execution, in favor of Kane, had been issued within the year and a day, any lands purchased and possessed by third persons, after the docketing the judgment, might have been sold. Here the plaintiff having lain by for more than a year and a day after he had obtained judgment, it became necessary to revive it against the original defendants, which, when revived, was of the same force and effect, and of course liable to be proceeded upon in the same manner as if the time, within which an execution might legally have been issued, had not been suffered to elapse." *Jackson* v. *Shaffer*, 11 John. 513; *Ridge* v. *Prather*, 1 Blackf. 401, where the question is ably considered. We think that the lien acquired by the Hood & Abbott judgment remained, and was in force, at the time of the sale on the Donnel judgment. That the purchaser under the Donnel judgment took nothing by the sale, prejudicial to the rights which accrued by virtue of the senior judgment; that at most, he could only follow the surplus fund after the senior judgment became satisfied by sale of the lot.

The court was right in deciding that the title to said lot one, was in the defendant, who held the same by virtue of a sheriff's sale, on the Hood & Abbott judgment.

Judgment affirmed.

J. C. Hall and *C. H. Phelps*, for appellant.

Reeves & Miller, *Rankin & Love*, for appellee.

Olive *v.* Dougherty.

There is no resulting trust in real estate, where there was no undertaking to buy, no money furnished, and no written memorandum of the arrangement.

To constitute a resulting trust by parole, it should be conclusively proved that the purchase money belonged to the *cestui que trust* or was advanced for him by some other person as a loan or gift.

To sustain a bill for specific performance of a parole agreement, the material allegations in the bill should be sustained by proof; and sufficient performance should be shown to take the case out of the statute of frauds.

A party claiming specific performance must show his full compliance with all the terms of the contract.

A contract for specific performance should be mutual and certain in all its parts.

In Equity. *Appeal from Lee District Court.*

Opinion by Greene, J. Suit by J. Olive for specific performance. The bill alleges a verbal agreement, under which it is averred that complainant entered into possession, and made valuable improvements on part of a lot in Keokuk.

The answer denies the agreement, and sets up the statute of frauds. Upon this issue and the depositions, the cause was submitted to the court, and the prayer of the bill was refused for want of equity.

Complainant now urges that the court below erred in dismissing the bill; and that the relation of trustee and *cestui que trust* exhisted between the parties. But the averments in the bill show no such relation. It merely shows that in June, 1845, Jones and Dougherty were in possession of a lot in the city of Keokuk, of which J. had 25 by 50 feet, and D. the balance, that there was an understanding between them that, when title could be obtained, they would purchase the lot and each hold the part he occupied; that in March, 1846, D. purchased the partition

title to said lot took a deed, and gave a mortgage for the purchase money, payable in one, two and three years; that D. recognized the arrangement after the purchase; that J. sold his right to Olive in April, 1847; that O. took possession, depending upon the arrangement with D. for title; and that J. and O. always stood ready to pay for their portion of the lot; that subsequently D. sold to Fletcher. But there is no averment that J. or his grantee, O., ever offered to pay or assume their portion of the purchase money, or ever placed themselves in a situation in which they would be justified in demanding a deed.

It appears that D. & J. were both in possession of portions of the lot, and had made the improvements before they talked of any arrangement to secure title, and by that arrangement neither of the parties assumed the trust. There was no undertaking to buy the lot; either of them might do it, or neither. No consideration or written memorandum of the arrangement was passed between the parties. There was no fiduciary relation established; no confidence reposed, no trust created.

According to Barnardeston C. R. 388, there are only two kinds of trusts by operation of law; either where the deed has been taken in the name of one, and the purchase money paid by another; or where the owner of an estate has made a voluntary conveyance of it, and declared the trust, in part, to be for another, but is silent as to the other part.

The present case falls far short of this rule. The purchase money was not paid by J., nor was any portion ever tendered to D., in whose name the lot was entered, and still the whole foundation of such a trust is the payment of the purchase moneys.

Again, the rule prevails without exception, that unless the trust arise on the face of the deed itself, the proofs must be clear and conclusive—1 Bibb. 609; 3 John. 222; 2 Serg. and Rawle 527; 3 Ves., Jr. 705; 10 ib. 511; 1 Vern.

366; 2 Atk. 71; 23 Maine 410—and, however clear the proof may be, it has been doubted whether parole evidence is admissable against the sworn answer of the defendant, denying the trust. 2 Atk. 155; 4 East. 577; 29 Maine 410. In cases where such evidence has been held admissible, it was received with great caution. 1 Bibb. 609; 1 John. Ch. R. 582; 2 ib. 405; 4 Blackf. 539; 5 J. J. Marsh. 590; 5 Porter 195; 8 S. and R. 484. But in *Botsford* v. *Burr*, 2 John. Ch. R. 404, it was held, that if the person who sets up a resulting trust has, in fact, paid no part of the consideration money, he will not be allowed to show, by parole proof, that the purchase was made for his benefit; held also, that any payment, or advance of money, *after* the purchase, can not raise a resulting trust, without overturning the statute of frauds. 4 East. 577; 7 Cranch. 177; *Mahomer* v. *Harrison*, 13 S. and M. 53; *Rathbun* v. *Rathbun*, 6 Barb. 98.

We think the authorities clearly establish the doctrine that to constitute a resulting trust in real estate, by parole, it should be conclusively proved that the purchase money belonged to the *cestui que trust*, or was advanced for him by some other person, as a loan or gift. *Getman* v. *Getman*, 1 Barb. Ch. R. 299; Sugd. on Ven. 140; Hill on Trustees 92; *Shoemaker* v. *Smith*, 11 Hum. Tenr. 81. Under the authorities, it obviously follows that no trust is established in the present case.

But there are other reasons which justified the court in dismissing the bill. The agreement, alleged in the bill, is not sustained by the proof, nor is a sufficient performance shown to take the case out of the statute of frauds. Even in the agreement alleged, there is no certainty as to time of performance, or the price to be paid. It also shows a want of mutuality. D. was not bound to purchase title, nor was J. under any obligation to buy of him, if he did purchase. There was no reciprocity, no mutual obligation,

no consideration, in a word, no contract between the parties. Nor did complainant tender his share of the purchase money to defendant, but filed his bill for a specific performance, without having first placed himself in a situation to claim equity. He who seeks, must first do equity.

A party claiming specific performance, must show his full compliance with all the terms of the contract. 2 Story Eq. Jr. §§ 271, 276; 1 Scam. 54; 1 How. U. S. 76.

The contract must be mutual, the tie reciprocal, or a court of equity will not enforce a performance. Harring Ch. R. 124, 420; 1 Ham. 14; 6 ib. 383.

The contract to be enforced, must be certain in all its parts, and clearly ascertained. 2 Story Eq. Jr. §§ 751, 767; 6 Paige 288; Harring Ch. 124; 1 Gilman 454; 14 Peters 77, 82.

In this case, therefore, we are clearly of the opinion that the court below decided correctly.

Decree affirmed.

Hall & Phelps, for appellants.

Geo. C. Dixon, for appellee.

SEELY *v.* REID.

Where the record is silent in relation to the service of process, jurisdiction will be presumed, on the ground that courts of general jurisdiction are favored with that legal presumption, which forbids all inquiry into jurisdiction, in collateral proceedings. But if the record shows no service there is no jurisdiction over the person, and a decree against him is void.

Where the record shows that there was no jurisdiction, either over the parties or the subject matter, the judgment and sales under it are void, and may be so declared in a collateral proceeding; but where the record is silent upon facts necessary to confer jurisdiction, the law presumes the decision correct, and the judgement will be binding till reversed.

ERROR *to Lee District Court.*

Opinion by KINNEY, J. This was an action of right, brought by Seely, in the Lee district court, 1849, for the recovery of the north-east quarter of section thirty-one, and the north half of section thirty-two, all in township sixty-nine north, and range six west. The case was tried at the April term, 1850, and a verdict and judgment for the defendent. By the bill of exceptions, taken by plaintiff, it appears that Jacob Beeler, in 1840, was the owner in fee of the land above described. At the April term of the Lee district court, 1843, W. Rufus Stewart, assignee of Calvin I. Price, recovered a judgment against said Beeler for the sum of three hundred and fifteen dollars and fifty cents debt, and eighty-one dollars and ninety-three cents, damages and costs of suit. An execution was issued on this judgment July 13, 1844, and levied upon the north-east quarter of section thirty-one, and the west half of the north-west quarter of section thirty-two, township sixty-eight north, range six west. The same was duly advertised, and on the 13th day of September, 1844, sold to Seely for $505 18, and the execution returned, satisfied, in full.

We will here observe that this action is brought to recover land in township sixty-nine, that Beeler's land, as will appear, was in sixty-nine, but that the sheriff described the land, in his return of levy and sale, as in township sixty-eight. This sale was September 13, 1844. September 20, 1844, Reid purchased of Beeler the north-east quarter of section thirty-one, and north half of section thirty-two, in township sixty-nine north, range six west, for $1400 00, and a deed therefor on same day. He also executed to said Beeler the following instrument:

"I, James Reid, of the county of Union, and State of

Indiana, having this day, purchased from Jacob Beeler the north-east quarter of thirty-one. (31) and the north half of section thirty-two, all in township sixty-nine, north and range six west, in the county of Lee, and Territory of Iowa; and, whereas, there was a judgment obtained against the said Beeler, in favor of W. Rufus Stewart, before this purchase, now therefore, I agree to take said land, subject to any lien or incumbrance which there may be on said land, in consequence of said judgment, and save said Beeler harmless, against or in consequence of any liability against him, by reason of said judgment. JAMES REID."

There does not appear to have been any deed made to Seely, by virtue of the sheriff's sale, in 1844. On the 25th September, 1846, Seely filed a bill in chancery against Stewart, Stotts—the sheriff, James Reid, and Jacob Beeler, alleging that the sheriff levied the writ, issued on said judgment, on the above described land, in township sixty-nine; that the same was owned in fee simple by Jacob Beeler; that the sheriff sold the same to said Seely; that it was understood by the sheriff and orator to be the land of Beeler, in township sixty-nine, but states that the sheriff, in entering his said levy upon said execution, and making his return of his proceedings, and the sale aforesaid, by accident mis-described said tracts of land, by describing the same as situated in township sixty-eight north, in the place of township sixty-nine; that said Beeler had no right, title, or interest in any land in township sixty-eight; that orator was informed by the sheriff that he was purchasing a part of the tract of land where said Beeler then resided, in township sixty-nine. Bill states satisfaction of execution by said sale; sale of land to Reid, thereafter being subject, as was supposed, to redemption; that said Reid had a full knowledge of the existence of said judgment and sale; but orator does not know whether or not said Reid knew of the mistake in said sale; that the amount of the

bid was deducted from the price of said sale to Reid by Beeler, and that the contemplated redemption of said land by said Reid, from orator's said purchase, was a part of the purchase price.

Bill prays a conveyance from Reid for the premises intended to be sold; that said mistake be corrected, and said sale be deemed to be made according to the true intent, meaning, and understanding of orator, said sheriff, and Beeler; or, in case orator is not entitled to have conveyance, then that said court would decree that said sale would be set aside, and the judgment stand in full force and effect, in the same manner as if sale had not been made; and, that the same stand and be decreed to be collected, for the use and benefit of said Seely, and that said land be chargeable with the payment of the same. The record shows thatBeeler was not served with process, and did not appear personally, or by counsel. Reid appeared and demurred, and Stotts and Stewart made default. The court renderedthe following decree:

Elie Seeley
v.
James Reid, W. Rufus Stewart, William Stotts and Jacob Beeler. } June 10, 1847.

This day this cause came on to be heard on the demurrer of defendant, Reid, which is overruled, and the said defendants having failed to plead, answer, or demur to said bill, and said Reid abiding by his said demurrer, it is thereupon, hearing of said cause, ordered and adjudged, and decreed by the court that the said sale, mentioned in said bill, be set aside, and that the satisfaction of said judgment and execution, by virtue of said sale, be set aside and vacated, and that said judgment in favor of said Stewart against said Beeler, stand and be taken, and stand as though no such execution had issued, or sale taken place. It is, therefore, ordered that the proceeds,

hereafter to be collected on said judgment, be paid to complainant.

After this decree, to-wit: on 2d day of November, 1847, execution was issued and levied upon the following land: north-east quarter of section thirty-one, township sixty-nine, north range six west; also, north half of section thirty-two, township sixty-nine, north range six west, in all 480 acres. The same was struck off and sold to Elie Seely, for the sum of six hundred and thirty-six dollars and fourteen cents, for which a sheriff's deed was executed to said Seely, April 12, 1849.

The plaintiff, Seely, to support this action of right in the court below, first introduced evidence of title in Beeler, which showed that at the time judgment was render in favor of Stewart, he owned the land in controversy. He then introduced the sheriff's deed, as given above, and rested.

The defendant then introduced the first execution, which showed that the judgment was satisfied by sale of land in township sixty-eight. He then introduced the deed from Beeler to him, conveying land in township sixty-nine, subsequent a few days in date to the date of sale, and satisfaction of said judgment.

As rebutting evidence, the plaintiff then offered the bill, proceedings, and decree in chancery, correcting the mistake of the sheriff, but this evidence was objected to by defendant, and objection sustained by the court, and judgment rendered in favor of the defendant. This decision of the court is assigned for error.

It is conceded, in the argument, that the court rejected this evidence because the record showed that Beeler was not served with process, and made no appearance. In this the court were clearly right. Beeler was a necessary party to the suit in chancery. The bill prays that the judgment against him may be reinstated. It seeks to make it a lien upon the land which he had conveyed to Reid, and the

title to which he covenants to warrant and defend. Hence he was made party. The process returned, as to Beeler, not found. There is no evidence of publication, and it does not appear from the record that he appeared. The court rendered decree, setting aside the sale and the satisfaction of the judgment and execution, and ordered that said judgment against said Beeler stand, and be taken, and stand as though no such execution had issued, or sale taken place. This the court could not legally do, never having acquired jurisdiction of the person of Beeler. If the record was silent in relation to the service, jurisdiction would be presumed, upon the ground that courts of general jurisdiction, in the exercise of their ordinary powers, are favored with that legal presumption which forbids all enquiry into jurisdiction, in a collateral proceeding. But when it appears, from the record of such court, there was no service, that it had no power to render the judgment which it did render, its most solemn acts are mere nullities, of no more force or efficacy than judgments of courts of inferior jurisdiction, upon matter over which they had no control. *Voorhies* v. *Bank*, 10 Peters, 449; *Thompson* v. *Tomlin*, 2 Peters, 157; *Rose* v. *Hemely*, 2 Cond. 100; *Lessee of Hickey* v. *Stewart et al.*, 3 How. 750; *Hellingsworth* v. *Barbour*, 4 Pet. 466; *Bloom* v. *Burdick*, 1 Hill. 130; *Shriver's Lessee* v. *Linn et al.*, 2 How. 43; *McComb* v. *Marshall*, 8 S. and M. 505; *Enos* v. *Smith*, 7 ib. 85, 9 How. 348, 349; *Wheaton* v. *Sexton's Lessee*, 4 Pet. Cond. 521; *Marshall* v. *Marshall*, 2 G. Greene, 241; *Reid* v. *Wright*, 2 G. Greene, 15; *Webster* v. *Reid*,* decided in Sup. C. U. S., *vide* pamp. ed., involving the same question as the case of *Reid* v. *Wright*, referred to above. In this case the decision of this court, in *Reid* v. *Wright*, is fully sustained. Judge McLean, in delivering the opinion says: "No person is required to answer in a suit, on whom process has

* 11 How. U. S. 437.

not been served, or whose property has not been attached. In this case there was no personal notice, nor attachment, or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the execution on which the land was sold." This decision is entirely in point, and must be decisive of the case before us.

The proceeding against Beeler was in *personam*. The complainant prayed for a decree to revive a judgment against him which had been satisfied. The decree is against Beeler without giving him a day in court, and hence absolutely void. But as opposed to this view of the subject we are cited to the case of *Wright vs. Marsh, Lee & Delevan*, 2 G. Greene, 95. In that case it is not decided that jurisdiction will be presumed where the want of it appears upon the record. This court has never so held. In that case the record dose not show a want of jurisdiction. Objection was made to the service, which was by publication. On this point the court say, "It appears then that proof of publication was before the court. It was considered, and the publication adjudged, to be such as was required by law."

Again the court say, "It was enough for the record to show the subject matter and the parties before the court, the exercise of judicial power in relation to them, and a final judgment." Here was jurisdiction, and this being established, the judgment could not be collaterally assailed for mere irregularity. But it is also said that in the case under consideration the court must have decided that it had jurisdiction over Beeler, or it would not have rendered a decree, and therefore that decision is conclusive. This would be a correct position, if the record did not disclose the fact that Beeler was not served and did not appear.

We think the following the true rule on this subject: When the record shows that there was no jurisdiction, either over the parties or subject matter, the court has no

power to decide any question affecting the person or subject matter over whom or which jurisdiction has not been obtained; and any judgment so made is absolutely void, and may be so declared in any collateral proceeding. When, however, the judgment is silent upon those facts necessary to confer jurisdiction, the law presumes the decision of the court in favor of jurisdiction to be correct, and its final judgment will be binding until reversed in an appellate court upon a direct proceeding. This doctrine applies only to courts of general jurisdiction in the exercise of their ordinary powers, and when their judgments are brought in question in the State where rendered.

The decree reinstating the judgment against Beeler being void, there was no valid subsisting judgment upon which execution could issue. The execution was also void, and the sale to Seely upon execution on such judgment communicated no title. It is well settled that there must be a valid subsisting judgment, execution and levy, and to these must the purchaser look in buying land at sheriff's sales. If there is no such judgment, all subsequent proceedings are void.

Beeler then not having been party to the proceedings in chancery, and the decree against him a mere nullity, the court did not err by rejecting it when offered in evidence.

We are not prepared to say that Seely, who evidently purchased in good faith at the first sale, and paid his money through an innocent mistake, has not a remedy. His money has satisfied a judgment, and either Reid or Beeler has received the benefit; but where his remedy is, or how to be obtained, is not for this court to determine.

Judgment affirmed.

J. C. Hall and *Charles Mason*, for plaintiff in error.

H. T. Reid, for defendant.

MARSHALL *v.* CHITTENDEN *et al.*

M. executed a deed of land to five persons and their successors, as trustees, to be appointed, regulated, and governed, in the manner stipulated in the deed, in trust for a Congregational Church, to be subsequently organized in the town of Keokuk, under certain regulations and contingences; some time after M. died, and his heirs conveyed the same land to S. T. M.; held that as the object of the trust was not in *esse*, and as the regulations and contingences had not been observed, the deed first made could not be sustained; held also, that the deed from the heirs divested all contingent interest under the first deed, and vested the title in S. T. M.

IN EQUITY. *Appeal from Lee District Court.*

Opinion by GREENE, J. Bill to revoke and cancel a conveyance of forty acres, executed by John McKean in 1846, to defendants, A. B. Chittenden and four other persons, in trust for an orthodox congregational church at Keokuk. Subsequent to the death of McKean, his heirs and widow conveyed the same land to Marshall, who files this bill to quiet his title. The defendant demurred to the bill in the court below. The demurrer was sustained and the bill dismissed.

Complainants appeal, and raise two questions for the decision of this court.

1. Was the deed from McKean to defendants a valid conveyance of any interest in the land? 2. Did not the subsequent conveyance to complainants, divest such interest, even if any passed to defendents, and vests the absolute title in complainants?

The deed to defendants, from one McKean, provides that their successors shall be chosen in the manner stipulated by the deed, and the conveyance is declared to be in trust, "for the use, benefit and support of an orthodox congregational church, at the town of Keokuk, to be called and named 'The Congregational Church of Keokuk,'"

The trustees are enjoined by the deed, to appropriate the forty acres of land and all proceeds arising from the sale or rents thereof, "to the use, benefits and support of the first congregational church which shall be organized at said town under the title aforesaid."

The deed stipulates that the trust shall be applied to no other purpose. It provides that any three of the trustees, or all the survivors, may fill any vacancy in their number; and in case a trustee resign, he is authorized to propose his successor.

The deed provides for a board of council to try charges against any one of the trustees, and to expel him for any moral delinquency. The trustees named in the deed accepted the trust, and agreed to perform the duties, December 25, 1846.

1. The first point presented for adjudication is, Does the deed create a valid contingent remainder?

It is obvious that the trustees were not vested with a freehold estate. The grantor intended to convey a legal title to them upon certain contingencies. This title was contingent upon their willingness to serve, their good behavior, their residence in Keokuk, and upon the facts that the "orthodox" congregational church should be organized.

Those contingences which affect the trustees, it may not be necessary to consider, because there is nothing in the record which disturbs the presumption of their willingness to act under the deed as trustees; the deed vested in them a *contingent naked legal title.* But the use under our statute could only take effect upon the contingency that the *cestui que use* should be organized or incorporated into existence. There was no such church at the time the deed was executed, and consequently the trust could be applied to no such use as that, stipulated in the grant. The use could not pass, because there was no party in whom it could be vested. It consequently remained with the

grantor and his heirs. It seems obvious that no estate was created by virtue of the deed, but a kind of remainder was, *infuturo* to pass upon the remote, possible contin-contingency, that the trustees should continue a valid existence, and the *cestui que use* should be created, be properly christened and located, and be embued with an orthodox spirit. But two of the trustees have deceased without legal succession, and consequently the board has no valid existence, nor has the church been organized, nor have the other contingences, stipulated, been performed.

This cannot be regarded, even as a valid remainder, for it does not appear to be supported by any vested estate of freehold. 4 Mod. 316; 2 Bl. Com. 168; 4 Kent, 234, 248. An estate resting upon a remote future contingency is void. 4 Kent, 283. Fern on Rem. 452; Coke Lit. 49. A remainder may rest upon a common or near possibility, as death, or even death without issue, but not upon a remote possibility as to a corporetion not then in *esse*. 4 Kent, 406. The organization of a church corporation is not an event which the law anticipates. It is *potentia remota*, and cannot be legally preserved even under laws where an established church is recognized.

It is conceded that there has been no such church organized at Keokuk, either before or since the death of the grantor; that consequently his use and title were in no way divested at the period of his death. It therefore follows that the use and title passed to his heirs, and that they had the right to convey a valid title to Marshall. Had the contingency happened; had the church been organized under the restrictions of the deed, and taken to itself the use and possession of the land, during the life time of McKean; much weight should then be given to the arguments of counsel for appellees. The contingency having happened, and the estate having passed to a party in being before his death, it might with propriety be assumed, under the doctrine of charitable uses that the conveyance

was not absolutely void, as against the grantor. In such a case, although the deed would, in itself, be legally void, as having had no grantor, and void as creating an estate *in futuro*, still the doctrine of cypress might be applied for the purpose of carrying out the intention of the grantor, under circumstances which gave notice to the heirs, or subsequent purchasers, that such intention was manifest, not only before, but after the contingency happened. But, in the case at bar, the contingency did not happen, there was no subsequent circumstances showing a continued intention on the part of the grantor, that his heirs should be divested of their rights upon any contingency subsequent to his death. Upon the death of McKean, there was in existence no adverse claimant to the land in question; the use and title, therefore passed to his heirs. They should not be divested of that title upon the mere naked, invalid, granteeless deed, under which the trustees claim rights. That contingent interest was so remote and uncertain, so destitute of any object upon which it could rest, that it should hardly be regarded as even a cloud of doubt upon the title of the heirs; and their subsequent conveyance to Marshall swept away any shadow of a contingent interest hovering about the impracticable deed made by McKean. We say the deed is impracticable, because it is not possible to carry out its stipulations. The grantor appears to have regarded the persons, to whom he undertook to convey the legal title, as a corporation; attempting to impart to them and their successors perpetual duration; establishing rules for their government, creating a court for the trial and expulsion of members, and giving them the power to appoint their successors.

The deed seems to contemplate the trustees as invested, in all respects, with corporate powers. It is obvious that he could not clothe them with such corporate powers, and equally obvious that the trustees could not carry out the intention of the grantor, without being legally incorporated

ted. Without such corporate powers, the legal title in them would descend to their heirs, and not to their successors, and thus one of the leading objects of the grantor would be subverted. It is true, courts should favor any demise or bequest made to charitable objects, but this should only be done consistently with the intentions of the donor. Here there was no demise or bequest, nothing more than a voluntary, vague, infeasible deed, without consideration or possession, and under which no rights had been acquired. Had it been the intention of McKean to divest his heirs upon a subsequent contingency, by a deed so irregular and invalid, he should have confirmed this intention by his will, as the doctrine of cypress is more applicable to demises than to conveyances.

1. We conclude, then, from the record before us, that the conveyance cannot be sustained even as a charitable use, because the intention of the grantor cannot be carried out consistently with the deed itself, nor with established principles of common law, as the object of the charity is not *in esse;* nor can it be good as a contingent use, or a contingent remainder, for the reasons already adduced.

2. We also conclude, that the conveyance from the heirs to complainant, divested all shadow of contingent interest, and vested the absolute title in complainant.

It therefore follows, that the demurrer to the bill should have been overruled, and a decree entered for complainant.

Decree reversed.

J. C. Hall and *L. R. Reeves*, for appellants.

R. P. Lowe, for appellees.

TIFFANY v. GLOVER.

The return of the officer upon the writ, must constitute the foundation of all subsequent proceedings against the property, under attachment. GREENE, J., *contra.*

The attachment proceeding being in derogation of common law, by virtue of a special statute, summary and extraordinary, the district court is therefore *quo ad hoc* a court of limited jurisdiction. GREENE, J., *contra.*

Where the sheriff did not return in express words that the "property attached was the property of the debtor," but merely returned as follows: "January 2d, 1849, levied the within writ by attaching" the land described, and the report of appraisers; *held* that the levy was void, and gave no jurisdiction to the court over the property attached; held, also, that such levy could not be favored by legal intendment, and could be declared void in a collateral proceeding. GREENE, J., *contra.*

A certificate of acknowlegement is good, if not in the language of the statute, provided, the words in the certificate substantially comply with the object and meaning of the statute.

Appeal from Henry District Court.

Opinion by KINNEY, J. Tiffany filed a petition under the code against Glover, claiming the following described tract or parcel of land, to-wit: The south-east quarter of section twenty-nine, in township seventy-one, north of range six west.

The defendant, Glover, answered that he had title in fee simple to the lands mentioned. That on the first day of January, 1849, at Henry county, he had a legal demand against one Winthrop Cheney, who was in possession of said land, and seized in fee of the same, and had all the title in law and equity, free from all legal incumbrance; that he derived his title from one Huldah Cheney, by conveyance, executed on 27th day of June, 1843; that while the title so remained in said Winthrop, defendant sued out a writ of attachment against said Wintrop Cheney, his goods and chattels, lands and tenements, and th[illegible]

writ was, on the first day of January, 1849, by the sheriff, duly levied upon said land, to satisfy a claim due defendant from said Cheney. That at the March term of the district court following, defendant, on the appearance of said Winthrop, recovered a judgment of three hundred and eighty dollars, while the said writ of attachment was in full force upon said land; that in June, 1850, an execution issued on said judgment, and levied upon said land, which, after having been duly advertised, &c., was on the 15th day of August, 1850, struck off to defendant for three hundred and forty-one dollars, that being the highest and best bid; that a certificate of purchase was executed, and at the expiration of fifteen months, a sheriff's deed was executed to the defendant. Defendant denies any title to the said land in the plaintiff, &c. The cause was submitted to the court upon issue joined between Tiffany and Glover, and, after hearing the evidence, the court decided that the plaintiff had no cause of action.

From the bill of exceptions, taken by Tiffany, it appears that both parties trace their title to Huldah Cheney, who, it is agreed, had a good title, which was duly conveyed to Winthrop Cheney, from whom both claim to have derived title; the plaintiff by virtue of a deed from Winthrop, purporting to have been executed on the first day of July, 1848, and filed for record on the twelfth day of February, 1849; and the defendant, by virtue of an attachment upon the land, judgment against Winthrop, levy and sale of the property in controversy. The proceedings in attachment to final judgment, sale, and sheriff's deed, are all set out at length in the bill of exceptions. From these, it appears that the writ was issued on the first day of January, 1849. Return, as follows: "January 2d, 1849, levied the within writ by attaching the south-east quarter of section twenty-nine, township 71, range six. Report of Appraisers: We, the undersigned, citizens of Henry county, possessing the

qualifications of jurors, having been summoned by W. S. Viney, sheriff of said county, to appraise the following property, levied on by him under and by virtue of said attachment, did, on the second day of January, 1849, after being duly sworn by said sheriff, proceed to appraise the same as set forth, to-wit: the south-east quarter of section twenty-nine, township seventy-one, range six, at five hundred dollars. January 2, 1849." Signed, Thomas Long, Samuel Wood, W. S. Viney, sheriff, H. C.

March term, 1849, parties appeared by their attorneys trial had, verdict for plaintiff for three hundred and eighty dollars, and a general judgment in *personam* entered against Wentworth Cheney. Upon this, a general execution was issued on the 14th day of June, 1850, the land levied upon 18th June, 1850, and August 15th, following, sold to Glover, and time of redemption having expired sheriff's deed made 17th November, 1851. This deed was filed for record 15th day of January, 1852. It is now contended, by the plaintiff, that the proceeding in attachment being in derogation of the common law, and the remedy a violent and extraordinary one, that it should be in strict conformity with the statute to give the court jurisdiction of the property attached, and that as the levy upon the attachment was not according to the requirements of the statute, that the court acquired no jurisdiction over the land by virtue of the attachment levy.

2d. That as the plaintiff's deed was upon record before judgment and seizure upon execution, that his title is paramount to the defendants. These propositions are controverted by the defendant. But if true, it is claimed, that as the plaintiff's deed was defectively acknowledged, there was no legal record of any deed from Cheney to Tiffany, and hence the defendant is an innocent purchaser without notice under a general judgment execution and sale.

The levy is claimed to be defective in this; that it does not appear, by the sheriff's return, that the property

attached was the property of the defendant, nor does it appear that the writ was executed in the presence of two witnesses, as required by statute.

The return of the officer, upon the writ, must constitute the foundation of all subsequent proceedings against the property under the attachment. It is only by the return that the court is advised of the levy, and special judgment and execution can only be awarded upon a sufficient levy, and this must be ascertained by the officer's return. The lien, arising by virtue of the levy, can only attach when the officer strictly complies with the requirements of the statute. The proceeding being in derogation of the common law, and of a violent character, it should affirmatively appear by the officer's return, that the provisions of the statute had been strictly observed, as the jurisdiction of the court over the property depends entirely upon a legal levy. It is by virtue of the levy, authorized by statute, that the court proceeds to render judgment of condemnation against the property. If the levy is defective, the court, acting as a court of limited jurisdiction under a special and stringent statute, has no power to proceed against the land.

In proceedings in attachment, the jurisdiction of the court is obtained by special authority, derived from the legislature, and hence the doctrine of presumption, as applicable to courts in the exercise of common law powers, cannot apply. In attachments, as we have said, it is the *levy* which confers jurisdiction, and if this appear defective it cannot be obviated by legal intendment, or covered by the favor usually extended to courts in the exercise of their ordinary jurisdiction. This first step, necessary to confer power upon the court to charge the land, must be correctly taken, or all subsequent proceedings under the attachment will be *coram non judice* and void.

In support of the correctness of the general propositions here asserted *vide Marshall* v. *Marshall*, 2 G. Greene, 242; *Witkie et al.* v. *Jones*, Morris Iowa R. 97; *Martin* v.

Dryden et al., 1 Gil. 212; *Brown* v. *Bodwell*, 4 Scam. 302; *Clark* v. *Harkness*, 1 Scam. 56. In *Bates* v. *Merchant Bank*, 8 Port. 99, it is expressly decided that where summary proceedings are given by statute, everything necessary to give the court jurisdiction must appear of record, and nothing will be taken by intendment. The same doctrine is held in *Hamilton* v. *Burum*, 3 Yerg. 365, where the following similar language is used: "Every fact, necessary to give the court jurisdiction in a summary proceeding, must appear of record to give the judgment validity; if they do not appear the judgment is *coram non judice* and void; *vide Barry* v. *Patterson*, 3 Humph. 313. *Vide* also, a very late case of *Maples* v. *Tunis*, 11 Humph. 108. In this case suit in attachment was instituted before a justice of the peace, land levied upon by virtue of the attachment, judgment on the attachment, execution issued thereon, and levied upon the land. The entire proceeding was then recorded in the circuit court, and an order of sale made; the land sold, and sheriff's deed made to the purchaser. Ejectment is brought to recover possession of the land. Objection is made to the validity of the sheriff's deed, because the affidavit in the attachment was defective in not stating the cause for which the attachment issued. The court say that the affidavit forms a material part of the record, and that they are not precluded by the writ of attachment from taking judicial notice of it. They further say "that the attachment must be strictly construed, being in derogation of common law, and that it is therefore a settled rule, in a series of cases, that any material departure from the requirements of these statutes will vitiate the proceeding, and render it utterly void. In such case the judgment and sale are void, and communicate no title to the purchaser." We only refer to this case *in extenso* to show how very far a highly respectable court, as late as 1850, has gone upon this subject. The proceeding was collateral, and because the affidavit was defective, the

judgment and execution were declared void, and it was decided that the sale communicated no title. It is not necessary, in this case, to adopt the decision to its full extent, but we cite it as corroborative of the general doctrine of the books in attachment cases.

This doctrine then being settled, it cannot be said that the court, in deciding the case between Glover and Cheney, in the attachment, decided in favor of the legality of the levy, and hence that, that is no longer an open question. The court, as we have said, in that proceeding was acting by virtue of a special jurisdiction, and that it rightfully acquired jurisdiction, and properly exercised it, must appear upon the record. We have a right, then, to look through and behind the judgment of that court to the point where its jurisdiction arose, and if we find that the *data* upon which it acted, were not sufficient to confer jurisdiction, all subsequent proceedings are *coram non judice* and void, and may be collaterally attacked whenever attempted to be enforced.

Looking into the proceedings then, in the attachment of *Glover* v. *Cheney* the case is narrowed down to this question: did the sheriff observe the requirements of the statute in making his levy? The sheriff should have returned, that the property attached was attached as the property of the defendant. In no other way could the court legally know the fact, and not until this fact was before the court could the court proceed against the land, as the land of the defendant. If the property of the *defendant* was not attached, there was no lien, there was no levy; and as the fact that it was attached as the property of defendant was essential to constitute a levy, such fact could not be established by extraneous evidence *dehors* the return. There is nothing in the officer's return upon which the court could base an opinion that the writ was levied upon the land of Cheney. The attachment and sheriff's return become muniments of title. The source of title under attachment

can only be ascertained by the return upon the attachment. To this, must the court look in awarding special judgment and execution. If from this it cannot be ascertained whose property is attached, all further proceedings should cease.

The sheriff, under the statute, is only authorized to attach the property of the defendant. It should appear affirmatively, upon his return, that in this particular he observed the statute. In attachment proceedings legal presumptions are not favored, and hence this omission cannot be supplied by intendment.

Again, the statute requires that "the officer to whom the writ of attachment is directed shall by virtue thereof, in presence of two citizens possessing the qualifications of jurors, attach any lands, tenements, &c., of said debtor." This does not appear to have been done by the sheriff. It constitutes a part of a legal levy and cannot be dispensed with. It is as necessary in order to a proper levy, that the officer should attach the land in the presence of two citizens possessing the requisite qualifications, as that he should act at all in the premises. He had no power to attach the land except in the presence of such citizens, and the attachment is of no effect unless it appears by the return that the officer complied with this provision of the law. True he had the property appraised, but this was also necessary in addition to requirement of §§6 *vide* R. S. p. 78. § 6, 7.

But it is said that Cheney appeared in court, and that this cures defects. We do not understand from the record that he appeared to the attachment; but be this as it may, his appearance could not make that a good levy which was no levy at all, so as to defeat a title conveyed by a deed which depended for its validity upon the insufficiency of the attachment levy. Cheney could not be permitted to sell land, pocket the money, and then by appearance divest a third person of his rights, and make the same land pay his debts. The court rendered a general judgment against Cheney. But in this case of *Tiffany v. Glover*, it must

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have decided that the lien upon the land dated from the time the attachment was levied. In this way it has been presented to us and so we understand it. If Tiffany has a deed properly executed and acknowledged, in no other manner could it have been defeated by the court below, as it was filed for record before the judgment against Cheney was obtained.

The objection made to Tiffany's deed is, that it is defectively acknowledged, and that the record of a deed thus acknowledged would not impart notice to a subsequent *bona fide* purchaser without actual notice. The officer states that before him personally appeared the *within* Winthrop Cheney and acknowledged the signing and sealing of the *within* to be his voluntary act and deed for the purposes therein expressed. He also certifies that *said* Winthrop is personally known to him to be the person who signed and sealed the foregoing instrument of writing. It is claimed that the officer should certify that Cheney was personally known to be the person whose name is subscribed to the deed as "party thereto," and we are referred to §§ 10, 11 of R. S., p. 205. The certificate of acknowledgment is not in the precise words of the statute, the object of which is to prevent one individual from personating another. But we think the object and intent of the statute are fully observed by the officer, and the certificate substantially correct. The certificate states that the *within* Winthrop Cheney, &c. This must mean *the* Winthrop Cheney who is described in the deed as "party thereto." It cannot convey any other idea. If the officer had certified that, personally appeared before him Winthrop Cheney, who was known to be the person described in the said deed as grantor, it would only have been explanatory of the word "*within*." If the certificate had read instead of "within," a person purporting to be the within Winthrop Cheney, then the position taken would be tenable. Understanding the force of the word *within* as used by the

officer, the certificate of identity is sufficient. "*Said* Winthrop is personally known to be the person, &c.," that is, *the* Winthrop described in the within deed is personally known to be the person who signed and sealed the said instrument of writing. We cannot but regard the certificate of acknowledgment as substantially correct. We have never held, in giving construction to acknowledgments, that the literal language of the statute should be adopted by the officer, but that it is sufficient if he employs words of the same import and force, as has been done in the case before us. The conclusions which we arrive at in this cause are, first, that the attachment proceeding being in derogation of the common law, by virtue of a special statute summary and extraordinary, that the court was therefore *quo ad hoc* a court of limited jurisdiction. Second, that jurisdiction will not be presumed, but that the facts which gave jurisdiction should appear upon the face of the proceedings. Third, that the attachment proceedings in the case of *Glover* v. *Cheney* may be inquired into collaterally and if it appear from the record that the court did not acquire jurisdiction over the land of Cheney by a proper levy, such levy will be declared void. Fourth, that as the Sheriff did not comply with the requirements of the statute in making his levy, as appears from his return, Glover acquired no lien by virtue thereof upon the land of Cheney, and hence Tiffany's deed being executed and recorded before final judgment must have seniority. Lastly, that the acknowledgment of the deed from Cheney to Tiffany is good in law, and the record of said deed imported notice to Glover who purchased the same land at the Sheriff's sale. The court erred in deciding that Tiffany had no cause of action.

The questions involved in this case being of the utmost importance must be our apology for the time devoted to their consideration in this opinion.

Judgment reversed.

Dissenting Opinion by GREENE, J. It is with self distrust and much reluctance that I dissent from the majority opinion. Were the principles involved unimportant, or in harmony with the decisions of this court, I could more readily withhold my views. But to my mind, this decision, as a precedent for the future, and as affecting an extensive range of rights acquired under judicial action, involves principles of the utmost importance to our state; and, as I think, it comes in direct conflict with the precedent rulings of this court, and is calculated to impair rights judicially vested, I feel it my duty to take strong ground against the leading points decided.

In the first place, I cannot agree with the opinion that the return of the officer constitute the foundation of subsequent proceedings under the attachment. It is not the returns that constitute a valid attachment of property, and bring it under the control of the court; it is the act of serving the writ in presence of two citizens, as required by the act. Rev. Stat. 78, § 6. The next section stipulates that "the property attached shall be bound from the time of serving the writ, as aforesaid." Now, "serving the writ as aforesaid," is one thing, and *the* thing that binds the property to the order of the court; "the inventory and appraisement *of all the property, so by him attached*, is a second and different thing;" subsequent to all this, and after the attachment or levy is complete, comes the third and unimportant duty, of having the appraisement "annexed to and returned with said writ." These two sections of the act direct three distinct duties. 1. The attachment or levy of property. 2. The inventory and appraisement. 3. The return of inventory and appraisement with the writ.

The first act is performed by the officer in the presence of two citizens, having the qualification of jurors; the second, by the officer, together with those two citizens under oath; the third may be performed by the officer himself. The one act might be perfected to-day; the second next

week, and the third next month, and still all three acts be valid, and the property bound, from the moment the first act was performed. It follows then, that not the return, but the attachment of the property, constituted the authority of the court for subsequent proceedings against the land. I believe it has not, till now, been the doctrine of this or any other court to attach such fundamental importance to an officer's return, especially in a collateral proceeding like the present. In *Doe* v. *Heath*, 7 Blackf. 156, it was held that a purchase at sheriff's sale could not be prejudiced by the imperfect returns of the sheriff, nor even by his making no return at all. *Wheaton* v. *Sexton*, 4 Wheat. 503.

In *Haven* v. *Snow*, 14 Pick. 28, the sheriff, in *fact*, attached property a month sooner than his return stated, and within that month other parties attached the same property, and still the *return* was amended, and the fact that the attachment was made a month before the time stated by the return, became the foundation upon which all the attachment proceedings were regulated. So in *Berry* v. *Griffith*, 2 Har. & Gill. 337, it was held to be the right and duty of a sheriff to correct his returns so as to make them conform to the facts, whatever they may be, and give them legal effect.

In *Reid* v. *Healsey*, 9 Dana, 324, the neglect to make the necessary returns did not vitiate the sale. See also, *Eastman* v. *Eveleth*, 4 Met. 137; *Welder* v. *Holden*, 24 Pick. 8. *Booth* v. *Booth*, 7 Conn. 350; *Mathew* v. *Thompson*, 3 Ham. 272.

This court has repeatedly decided that an omission or irregularity in a sheriff's return cannot invalidate the rights of a *bona fide* purchaser under execution. *Humphrey* v. *Beeson*, 1 G. Greene, 199; *Hopping* v. *Burnam*, 2 ib. 39; *Corriell* v. *Doolittle*, ib. 385; *Patterson* v. *State of Indiana*, ib. 492.

Again, we are informed by the opinion that "the lien, arising by virtue of the levy, can only attach when the officer *strictly* complies with the requirements of the statute,"

But the act itself informs us that "the property attached shall be bound from the time of serving the writ." Rev. Stat. 79, § 7.

It is then stated, as a legal proposition, that "it should affirmatively appear by the officers return that the provisions of the statute had been strictly observed, as the jurisdiction of the court over the property depends entirely upon a legal levy." The only return required by the act is that the inventory and appraisement "shall be annexed to and returned with the writ." How then, can it be assumed that the return must show affirmatively that the provisions of the statute had been strictly observed? A legal levy, as already shown, is by no means dependant upon, or the sequence of such a return.

The ground is then taken, that in such proceedings, the jurisdiction of the court is limited, and "obtained by special authority, derived from the legislature, and hence the doctrine of presumption or legal intendment cannot apply." I consider this proposition and conclusion alike unfounded. It by no means follows that because attachment proceedings are authorised by statute, that therefore the jurisdiction of the district court is limited and special. There is no provision of that law calculated to restrict the general power of the court; on the contrary the law increases the authority of the court, by adding new powers to its general and unlimited common law jurisdiction. Still, that general jurisdiction is to be exercised "in such manner as shall be prescribed by law," Constitution, Code 553, § 4. Now in attachment, as in all other proceedings authorised by law, the jurisdiction of the court is of the same general nature. Although it must conform to the manner prescribed, yet in all particulars not prescribed, its general common law and equity attributes are in full force, and those attributes should be freely exercised, where applicable, either in administering statutory or common law jurisprudence. The jurisdiction of the district court being general, and

superior as an original tribunal, it follows that no attribute or power can be taken from it, except by express negative words of a statute or by irresistible implication. *Commonwealth* v. *McCloskey;* 2 Rawl. 369; *Commonwealth* v. *White*, 8 Pick. 453; *Oversure* v. *Smith*, 2 S. & R., 363; *Murfree* v. *Leeper*, 1 Overt. 1; *Burginhofon* v. *Martin*, 3 Yeates, 470.

There is not a word or clause in the attachment law calculated to curtail or limit in any respect the jurisdiction of the court; how then can it be assumed that in administering that law the court becomes *inferior?* Because, it is said, the attachment law is in derogation of common law, and therefore *quo ad hoc*, the court is limited and inferior. This reasoning appears to be conclusive to some minds; but is it sound? Is the proposition true or the conclusion reasonable? What part of the common law is derogated, annulled or revoked by this act? Not a principle of common law is taken away or impaired by it and it never can be in derogation of that law. On the contrary it is a curative, not a disabling act; and so far as the powers of the courts are concerned it takes not one from them; it is entirely cumulative. It gives, but takes nothing away. What reason or foundation then is there for the conclusion, that as to the attachment law the court is to be considered as limited and inferior?

It will be readily conceded by all, that the original writ and proceeding to which the attachment was only an auxiliary, were under the general and superior powers of the court. The statute expressly declares the attachment to be merely auxiliary to the original writ, by which suit was commenced. Rev. Stat. 80, §19. The original writ having been issued in an action of assumpsit, at common law, the writ of attachment, comes in as an auxiliary, helping and aiding the general powers of the court. Clearly, then, this shows no derogation. no restriction. It leaves

the court in the full possession of its power to draw legal presumptions and enforce legal intendments.

I can find no good reason, or authority for rejecting the doctrine of presumption and intendment, in the auxiliary proceeding by attachment.

It is said, the law is violent and stringent, and therefore should be strictly construed, if violent and stringent, it is the province of the legislature and not of the courts to correct the evil. It is the duty of courts to administer the laws agreeable to the objects for which they were enacted. No legitimate intendment should be withheld, nor stringent rule enforced by which the obvious intention of the law would be defeated.

The great object of the attachment law is to protect creditors against fraudulent and dishonest practices too frequently resorted to by debtors. The law furnishes ample safeguards and security to the honest debtor, and simply authorises, as auxiliary to the original suit, an attachment to hold the defendant's property subject to the judgment that might be rendered against him. The law confers greater remedial powers upon the court, to secure justice between litigant parties. It follows, then, that the law should receive such legitimate consideration from the courts as would best secure the objects for which it was enacted.

This doctrine is fully recognized by our own courts in, *Steamboat Kentucky v. Brooks*, 1 G. Greene, 398, under a statute much more innovating upon common law. And in *Britney* v. *Jones*, 1 G. Greene, 266, it was held that "while a court will vigilently protect a debtor against the injury of an attachment illegally prosecuted, the creditor ought to be protected if he *substantially* comply with the requisitions of the law." See, also, *Corriell* v. *Doolittle*, 2 G. Greene, 385; *Roberts* v. *Bourne*, 10 Shep., 165; *Vrazie* v. *Park*, ib. 170; *Coffin* v. *Ray*, 1 Met., 212; *Wilder* v. *Holden*, 24 Peck, 8. If the points deciding those cases

are correct, how can the majority opinion in a collateral proceeding like the present be sustained.

The principles decided by this court in *Wright* v. *Marsh et al.*, 2 G. Greene, 94, directly recognise the general powers of the district courts, under statutory proceedings *in rem*, and distinctly apply the doctrine of presumptions in such cases. In fact these general principles of jurisdiction and presumption have been uniformly recognized in the decisions of this court until the present case arose.

In *Wright* v. *Watkins*, 2 G. Greene, 547, a decree in bankruptcy was pleaded, and although the general bankrupt act is especially in derogation of common law remedies, still it was held, that as the proceeding was had before a court of competent jurisdiction, it could not be collaterally drawn in question; and that nothing should be presumed against the authority or proceedings of the court.

The great case of *Voorhies* v. *U. S. Bank*, 10 Peters 449, is in direct conflict with the decision of the majority. In that case it is considered that the power to issue writs of attachment is an addition to the general powers of a court; that "no objection therefore can be made to their jurisdiction over the case, the cause of action, or the property attached;" and that "there is no principle of law better settled than that every act of a court of competent jurisdiction, shall be presumed to have been rightly done, till the contrary appears; and this rule applies as well to every judgment or decree, rendered in the various stages of these proceedings, from the institution to their completion, as to their adjudication that the plaintiff has a right of action." That case, from the supreme court of the United States, and so directly applicable to the case under consideration in all particulars, comes in direct conflict with the majority opinion; but that circumstance will hardly induce the highest court upon earth to overrule their leading decision on jurisdiction, especially since that decision has been so often confirmed by that court, and by the supreme courts of

about every state in the Union. The doctrine is becoming as universal as it is well founded in reason, and in the necessity for stability and uniformity in judicial rights, that whenever a judgment has been given by a court having jurisdiction of the subject matter and the parties, the fact that the court exercised jurisdiction warrants the presumption that all facts, necessary to confer jurisdiction, were proved. 2 Howard, 319; 7 ib. 188.

In this case it must be conceded that the district court had jurisdiction over the subject matter and the parties, that jurisdiction was brought into exercise, and judgment upon it was pronounced, and if there was any question or doubt about the ownership of the property, it must be presumed that the fact was proved as adjudicated. There was no exceptions taken or objections made at the trial, and no effort to have the judgment reversed, and still, now that the case comes up collaterally, an irregularity is presumed against that solemn adjudication, and against the public record of deeds, and the judgment declared void. That no such case can be thus collaterally impeached, see 2 Peters, 165; 6 ib. 729; 10 ib. 471; 1 Carter Ind. 296, 302.

It may be well, at this point, to enquire, upon what authorities, principle or reason this great change in our system of jurisprudence is justified. The only decisions of our own court referred to, are, *Wilkie* v. *Jones*, Morris 97; and *Marshall* v. *Marshall*, 2 G. Greene, 242. As much importance is attached to these cases it may be well to ascertain the analogy they bear to the case at bar.

In *Wilkie* v. *Jones*, two points are decided under the attachment law: 1. The words "*next term*" after publication, are only applicable to a *regular term*. 2. Where there was no personal service, judgment should be *in rem*, and not *in personam*. These are the only points decided in the case. True, there is *dictum* in the opinion to the effect that attachment proceedings are violent, and should receive a strict construction; but there is nothing said or

intimated against the general jurisdiction of the court, or against the doctrine of intendment.

The case of *Marshall* v. *Marshall*, has no application to the attachment law. It was under the partition act, and the court decided that notice by publication must be made, as required by statute. That is true, but what application has it to this case? Does it show that the writ of attachment was not served and returned as required by statute? It will be readily admitted that the writ should be so served and returned. But in the collateral case at bar, the opinion requires more, much more, in the return than the statute, itself, requires.

The cases referred to in Gilman and Scammon, have as little applicatian as the two cases from our own reports.

Bates v. *Merchant's Bank*, 8 Porter, Ala., 99, refers merely to summary proceedings given by statute. So, too, with the case in 3 Yerg., 365. I am not able to understand what application such summary proceeding can have to an auxiliary proceeding to a general action at law. But in the same volume from Alabama, I find the principle decided, that property levied upon, generally will be intended to belong to the defendant in attachment. 8 Porter, 245. This is directly to the point, and is confirmed by *Thornton* v. *Winter*, 9 Ala. 613.

So in *Reders* v. *Wofford*, 4 Smedes and Marsh., 579, where the officer returned a writ of attachment upon land "executed," without stating the manner of its execution, it was presumed to have been regularly executed.

It was held in *Hathaway* v. *Larabee*, 14 Shep., 449, that courts will give effect to a return, made by an officer, upon a writ of attachment, although informally made, when the intention is sufficiently disclosed by the language used.

So far has this general doctrine of presumption been carried, that courts have presumed a levy to have been made, even where there was no return at all. 11 John. 517. The rule is without exception, that where an officer is

required to perform an act, which if omitted, would be neglect of duty, it will be presumed that he has done his duty, unless the contrary is shown. 19 John., 347; 3 East. 192; 10 ib. 216; 3 Wilson, 362; 2 Black., 852; Butler's N. P. 298; 9 Peters, 134; 12 ib. 437; 3 New Hamp., 310; 10 Smedes and Mar., 452; *Dollarhide* v. *Muscatine Co.*, 1 G. Greene, 158; *McGuffie* v. *Dervine*, ib. 251; 2 Comstock, 42; 3 Denio, 117; 5 Barber, 611.

Many more corroborative cases might be cited from both English and American works, but, upon a principle of such universal application to all officers and courts, both inferior and superior, it seems unnecessary to multiply authorities, and still, this principle, appropriate and undeniable as it is, appears to have been overlooked or disregarded in the opinion under consideration.

It is conceded that the writ was valid and from a court of competent jurisdiction; that it was the duty of the officer, under this writ, to attach the property of defendant, in Lee county; that the sheriff's return shows that he "levied the within writ by attaching the" property in question; that the inventory and appraisement "was annexed to and returned with the writ," setting forth the requisite action in reference to "the property levied on by him, the sheriff, under and by virtue of said attachment;" and that the property levied upon, was in fact the property of the debtor, at the time; and still, because the sheriff does not, in express words, say "it was the debtor's property," the opinion assumes that the officer did not do his duty; it presumes that he neglected to do what his authority and oath of office required, and thus presumes in a collateral proceeding from a court of general jurisdiction.

Ever desirous to concur with the majority of the court, I have sought thoroughly, but sought in vain, for an authority, a principle, or reason, to justify the decision in this case. The same learned brother who wrote the opinion before me, prepared an able opinion in *Seely* v.

Reid,* decided at this term of court with my full concurrence. But surely these two cases are in direct conflict. Both cases refer to the same court, the same officer, and the same nature of statutory, and not common law process. Both cases come collaterally before the court. In one the writ was duly levied and returned; in the other the record distinctly showed that the process was not served and there was no appearance as to one of the defendants, and the court say: "If the record was silent in relation to the service, jurisdiction would be presumed, upon the ground that courts of general jurisdiction, in the exercise of their ordinary powers, are favored with that legal presumption which forbids all inquiry into jurisdiction in a collateral proceeding. But when it appears from the record of such court, that there was no service, that it had no power to render the judgment which it did render, its most solemn acts are mere nullities." Apply that doctrine, so uniformly recognized by this court, to the majority opinion in this case, and how can it be reconciled? It is said that the process of attachment is statutory, and should show strict compliance; but the process provided for chancery is also statutory, Rev. Stat. 107, § 5, 6, 7, 8, and 9, and *pari passu* should show strict compliance. Besides, the return in the present case contains all that is strictly required by the act. It requires no other return, than that the inventory and appraisement "shall be annexed to and returned with said writ." Rev. Stat. 79, § 7. This is the only return required by the law. This, and even more, was returned in this case. How then, under any rule of construction, however strict, can more be required?

Although this was a common law proceeding in assumpsit, aided by the auxiliary process of attachment, before a court of general and ample powers, yet we are told that "the doctrine of presumption, as applicable to courts in the exercise of common law powers, cannot apply." And still, in this very case, the opinion is founded upon a new system

* *Ante* p. 374.

of presumption. 1. The officer is presumed to have violated his duty, although his return shows that he did all that was required by statute, or by the mandate of the writ. 2. The two citizens under oath, are presumed not to have made "a true inventory and appraisement of all the property *so by him attached*," i. e. attached according to the mandate of the writ. 3. The sheriff and citizens are presumed to have been trespassers, in taking the property of a third party, although the record shows that the title to the property was in the attachment debtor at the date of the levy.

The attachment acts of Ohio and Missouri differ materially from ours, in requiring particular facts to be returned, and hence the cases referred to by counsel from those states, cannot be considered applicable to this. But, even under the decisions from those states, the majority opinion is without foundation or authority. The case in 13 Ohio. 209, is virtually overruled by 15 Ohio, 36, 444. In that case the sheriff's return does not show that the property levied upon belonged to the defendant, and still the proceedings were sustained. See also, 17 Ohio, 431.

In Missouri the return is made part of the record, and more is required than by the Iowa act, and besides the cases referred to in 1 Mo., 239; 2 ib. 15, 308, were up on error, and not collaterally. See 12 Mo., 147.

In 10 Mo. 336, the word "*executed*" was considered sufficient. It was held, "the term executed can mean nothing more or less, than that the officer had complied with the mandate of the writ." 13 Smedes and Mar., 284; 14 ib. 266. Much more clearly does the case at bar show such compliance.

In 20 Vermont 261, property attached is presumed to be in possession of the debtor.

The following authorities are also directly in point; and show that the illegality of service does not involve a question of jurisdiction: 6 Har. and John., 182, 205; 20 Wend.,

145; 2 Hill, 518; 7 Barb. 656; 11 ib. 525; 13 ib. 412; 14 Howard 587; 3 Shep. 73

The record, in this case, and the various authorities to which I have referred, and the still greater number which I have examined as applicable to this inquiry, lead me necessarily to the following conclusions.

1. The sheriff's return and the attachment proceedings in this case were made and conducted in substantial compliance with the attachment law:

2. In a case — unlike the present—where the attachment is defective or irregular, and where, as in this case, the original proceeding, upon which judgment was rendered, comes within the general jurisdiction of the court, and that jurisdiction appears to have been exercised to final judgment; every matter adjudicated either in the original or auxiliary proceedings, becomes a part of the record, which thenceforth proves itself, will be favored by every legal intendment, and cannot be collaterally questioned.

3. Where attachment proceedings are exercised, by a court of general powers, and as auxiliary and cumulative to an original proceeding under those general powers—as in this case—that the general jurisdiction is not "therefore *quo ad hoc* limited," but is rather extended, and should be favored by the same general presumption and intendment as if the jurisdiction had not been extended to attachment process.

4. The four conclusions of the majority in relation to this collateral attachment proceeding, are plausible deductions from the principles so ingeniously advanced; still these principles, being in part not applicable, and in part without precedent; the conclusions are without sufficient foundation in law or reason, and cannot be sustained on principle or authority.

5. The judgment should be affirmed.

Reeves & Miller and *J. C. Hall*, for appellant.

D. Rorer and *LeRoy Palmer*, for appellee.

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STEMPLE *v.* HERMINGHOUSER.

The non-resident foreigner cannot inherit the estate of his resident parent. GREENE, J., *contra.*

ERROR *to Lee District Court.*

Opinion by KINNEY, J. Christian William Stemple, a native of Prussia, imigrated to the State of Iowa, and purchased about eleven hundred and seventy-eight acres of land in Lee county. On the 23d day of October, 1849, Stample died intestate, leaving a number of children residents of the United States, and also a number natives of, and residents in Prussia.

Herman Stemple, one of his said children, residing in Lee county, Iowa, filed a petition in the district court, praying for a partition of the lands of said Christian William Stemple, deceased, and an allotment of the same among his children residing in the United States at the time of his death; and alleging that the other children residing in Prussia at that time, were not entitled to any interest in the said lands.

Notice of the pendency of this petition was given to all the children of said Stemple residing in this country, and without any other, or further notice by publication or otherwise to the *non*-resident children, application was made for the appointment of commissioners to divide and allot said lands. This application the court refused, on the ground, that notice should have been given to the non-resident children of said Stemple. The bill of exceptions however, shows that a decree was rendered against the petitioner *pro forma*, in order to have the question definitively settled by this court.

The only question presented for decision is, can non-resident aliens take land by descent in this State. This

question is easily answered, unless by constitutional provision, or legislative enactment, the rule at common law has been changed. It is the well settled doctrine of the books, that at common law, an alien cannot acquire a title to real property by descent, or created by other mere operation of law. *Calvin's Case*, 7 *Co.*, 25 a., 1 *Vt.*, R., 417; *Jackson* v. *Lunn*, 3 John. Cases, 109; *Hunt* v. *Warwike*, Hardin's R. R. 261. The law *quæ nihil frustra* never casts the freehold upon an alien heir who cannot keep it. Therefore where a person dies, leaving issue who are aliens, the latter are not deemed his heirs at law. They have no inheritable blood, and the estate descends to the next of kin who have inheritable blood, in the same manner, as if no such alien issue were in existence. *Orn* v. *Hodgson*, 4 Wheat. 453; *Jackson* v. *Green*, 7 Wend. 333; *Jackson* v. *Fitz Simmons*, 10 ib, 9.; *Orser* v. *Hoag*, 3 Hill, 79; 2 Kent Com., 3d ed. 53.

It is a general rule, that even a natural born subject, cannot take by representation from an alien, because the alien has no inheritable blood through which a title can be deduced. If therefore a person dies intestate, without issue, and leave a brother who had been naturalized, and a nephew who had been naturalized, but whose father died an alien, the brother succeeds to the whole estate, for the nephew is not permitted by the common law to trace his descent through his alien father. *Levi* v. *McCarty*, 6 Peters U. S. R. 102; 2 Kent, 54. It has also been held upon good authority, that, though an alien be afterwards naturalized, he cannot secure the estate, and this for the reason, that the fee will not rest in abeyance. The capacity to take must exist at the time the descent happens. Naturalization may confirm a defective title, but will not confer an estate.

It may be assumed as the settled doctrine of the common law, that an alien can never take by the act of the law, as by descent, for he has no inheritable blood.

4 Black Com. 249; *Fairfax* v. *Hunter*, 7, Cranch 603, 619; *Vanx* v. *Nesbit*, 1 McCord, Ch. R. 352; *Orr* v. *Hodgson*, 4 Peter Cond., 506; 2 Black. Com., 149. It is clear then, that at common law those children of Christian William Stemple, who were alien foreigners at the time of his death, were not, nor could they be heirs to the estate in Iowa, and therefore had no interest in the proceeding for partition, and should not have been made parties, or notified by publication. Does our constitution change this rule, and are they by that instrument endowed with an inheritable capacity? The ordinance of 1787, and statutes of the Territory of Iowa including those of Michigan, and Wisconsin in force in the Territory, did not alter the rule of the common law. Neither by common law, nor by these statutes, could alien residents, or non-residents take land by descent.

The statute regulating the descent of property in Iowa, at the adoption of the constitution, was that of February 13, 1843, and provides that the lands of any person dying intestate, shall descend in equal shares to his children. This evidently means such children as have inheritable blood; for it being an inflexible rule at common law, that aliens, resident or non-resident, are not heirs, cannot take by descent, nothing less than a plain and express provision in relation to them will change this rule. Then at the adoption of the constitution the common law doctrine prevailed.

The 22 §, 1 Art., is as follows: "Foreigners who are, or who may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as natural born citizens."

Here is a material change in favor of the foreigner. It being a part of the wise policy of our government to encourage the emigration and settlement of foreigners; to place them as nearly as possible upon an equal footing with native born citizens, to secure to them the possession and inheritance of real property, this wholesome provision

was engrafted into the fundamental law of the state. But it will be observed that this applies only to *resident* foreigners, and those who may become *resident*. Before the adoption of the constitution none, except native and adopted citizens, could inherit by descent. Since the constitution, *resi dents*, though aliens, occupy the same position, in this respect, as native born citizens. So far as *non-resident aliens* are concerned, while they remain such, the common law is unchanged. If they become residents of Iowa, they then enjoy the same rights of property as native born citizens.

But it must not be supposed from this, that the children of Stemple, in Prussia, at the time of his death, could come here and claim a portion of this property. It is necessary that foreigners, claiming to take land by descent, should be resident here at the time of *the descent cast*. An estate rests in the heirs at law *immediately* on the *death* of the ancestor. It does not remain in abeyance; if it did, it might always so remain. They certainly cannot share the estate while they remain in Prussia; and can it be conjectured that they *may* become residents of Iowa, and upon that conjecture suspend the operation of the descent? We think the constitution means no such thing, but it merely places those foreigners who were in the State at the time of its adoption, and those who should afterwards come in as residents, upon the same equity. The right to inherit depends upon the existing state of allegiance at the time of the descent cast, and the capacity to take must then exist. *Orser* v. *Hoag*, 3 Hill., 79; *People* v. *Conklin*, 2 Hill., 67.

We are of the opinion that the court erred in deciding that the children in Prussia were entitled to notice.

Judgment reversed.

Dissenting opinion by GREENE, J. I cannot agree with the majority in this case. True, their opinion is authorized by the statutes and decisions of England and New York,

but I cannot consider it in harmony with the statute and liberal policy of Iowa.

To assume that because the legitimate child and heir of an intestate be born outside of certain geographical limits, he thereby forfeits all inheritable rights, which naturally, and in strict justice belonged to him, is without any foundation in reason, and an outrage upon the equality and rights of men. No doubt such a policy would be readily indorsed by the selfish dictates of crowned heads, to which the property would escheat; but surely it is alike repugnant to sound integrity, to the rights of persons, and to the enlightened sentiments of the age. It is inconsistent with the great truths and principles of right, upon which most of the common law is founded. It is one of the few remaining despotic features of that law which is repulsive to American institutions, and which should receive no countenance from American courts.

What foundation is there for the difference made, at common law, between inheritable and non-inheritable blood? Why this great disparity in the blood? Is there any reason for it in fact or in law? The law is said to be the perfection of reason. Reason is the soul of the law, and where the reason for a law ceases, so does the law itself. The reason for this prerogative of the crown ceased with our declaration of independence, and our republican forms of government. From that time the rights of all, both native and alien, were encouraged and protected by our more equal, just and catholic systems of law. Our constitution and laws are made for the *people*, whose persons or property may come within their supervision, and not for the citizen or resident only. The rights of property in a non-resident are distinctly recognized by our laws. The first article of our state constitution declares that, "all men—have certain unalienable rights—among which are those of *acquiring, possessing and protecting property*, and obtaining safety and *happiness*."

What dearer or more unalienable right has a parent than that of acquiring and protecting property for his offspring? What contributes more to his pursuit of happiness. Surely, under such a declaration of rights, so comprehensive and universal in its application, there can be neither reason, propriety, nor justice in thus excluding the non-resident child from the property acquired for him, by his resident father. In Iowa, at least, this relic of despotism and injustice should have no vitality as a principle of common law.

It is not only repugnant to the declaration of rights, but to my mind it is in direct conflict with the prevailing spirit, and also the express letter of the constitution. Art. 1, § 22, guarantees, that "foreigners who are or who may hereafter become residents of this State shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens." My learned brother well remarks: "Here is a material change upon common law in favor of the foreigner;" and speaks truly of the wise policy of our government to encourage the imigration of foreigners," &c., but I cannot indorse his conclusion, nor the construction which the majority place upon that section of our constitution. The opinion shows that C. W. Stemple, the father, was a resident of this State at the time of his death. Does it not follow then that he had the same rights in respect to the possession, enjoyment *and descent* of property *as a native born citizen.* The same rights and the same rules of descent are insured to this resident foreigner, as to the native born citizen. His estate is to descend in the same way, under the same laws and subject to the same distribution. If this section was limited to the possession and enjoyment of property, there would be more propriety in limiting its construction to the party, and act of inheriting. But the section goes much farther. It insures to the resident foreigner the same rights as to the transmission of his property, "the same rights in respect to the descent"— to his heirs as a

native born citizen. It not only insures possession and enjoyment to the resident, while living, but it also insures the same rights in respect to the descent of his property, when dead. These rights apply not only to the party who may inherit or possess the estate, but also to the party from whom the estate descends, and it makes the blood of that parent's child inheritable wherever that blood may be. As the blood of the fountain is made inheritable, that which flowed from it is equally so.

I object also to the construction given to the statute regulating descents. There is nothing equivocal in the language. It expressly declares that, "when *any person* shall die seized of any lands, &c., not having lawfully devised the same, they shall *descend* subject to *his* debts, in manner following: First, *In equal shares to his children*," &c. But we are told "this evidently means such children as have inheritable blood." Rev. Stat. 722, § 1. Where is the evidence for this strange meaning? Does the constitution or the letter or spirit of the statute indicate any other meaning than that which is expressed in such clear terms? If a child is born in Prussia, is he any less the child, the descendant of the parent than the son born in Iowa, or is the blood, or the rights of the one any less legitimate or inheritable than the other? To propose questions so self-evident is but to answer them.

But even under the construction placed upon the constitution and statute, by the majority, it must be admitted that those children residing in Prussia, had a conditional interest in the land. They might hereafter become residents of the state, Code 545, § 22, and thus remove the non-inheritable taint from their blood. They had then, at least, a contingent remainder in the land, and therefore they should have had their day in court. They were entitled to notice. With that notice they might have established their rights under the constitution and laws of the

State. I think, therefore, that the court below ruled correctly, and that the decree should be affirmed.

E. Johnsten, for appellant.

Bailey *v.* Hearn.

Upon a proper showing where there are no intervening rights, in the exercise of a sound discretion, a court may open its own judgments and set them aside when improperly or wrongfully obtained. This discretion not interferred with by the Code.

Appeal *from the Lee District Court.*

Opinion by Kinney, J. Hearn having failed to plead, answer, or demur, a decree was entered against him at the April term, 1852. Before the next term of the court, he filed a petition to open and set aside the decree. The petition was demurred to, the demurrer overruled, and the decree and judgment of the court of the preceding term ordered to be opened and set aside, and the cause set down for hearing. From this decision Bailey appealed.

An elaborate argument is submitted, and numerous authorities cited, to show that the district court exercised an unwarrantable power in setting aside the decree. Chapter 106 of the Code is also relied upon as containing sections at variance with the decision of the court. Unless strictly forbidden by statute, it is always a matter of discretion with the court to open its own judgments, and set them aside when improperly or wrongfully obtained. In doing this, courts should exercise a sound discretion, but the power to exercise such discretion, is undoubted upon proper showing, when there are no intervening rights. This power, we do not think, is wrested from the courts in cases like the one before us.

Code § 1853, provides that "when the proceedings are of an equitable character the court, upon reading the pleadings and proof, and hearing the testimony offered, shall render such judgment as is consistent with the rules heretofore observed in chancery cases." This section is applicable to all proceedings in chancery, whether it be when the cases are originally presented on their broad merits, or upon pleadings and proof to set the judgments aside.

We are strengthened in our view of the construction of this section, from the fact that the chapter is entitled "judgment by default," and this is the only section upon the subject of equity practice. The right of a court over its own judgments, to correct the injustice which is often done to a defaulting defendant, in chancery cases, we think is not interferred with by the Code. Such right is almost indispensable, for the administration of justice, and, unless taken away by plain and express provision of statute, attaches to the court as an inherent and necessary power. It will be observed that the judgment defendant in this case did not sleep upon his rights, or delay his application to set the the judgment aside. His petition was filed soon after the term at which the judgment was obtained, and the first term thereafter the judgment was opened and set aside, and the defendant allowed to make his defence. Having stated that the court had the power to do this, and that it is an inherent and necessary discretion, we have only to look into the facts, and ascertain whether they justify the action of the court. These facts it is unnecessary to review, but after the most careful examination, we are free to say that the petitioner made out a strong case, and such an one as clearly showed that the judgment, if permitted to stand, would operate greatly to the prejudice of his rights.

We therefore conclude that the court did not err in the decision.

Judgment affirmed.

Rankin & Love, for appellant.
Reeves & Miller, for appellee.

POWELL *et al. v.* SPAULDING *et al.*

The supreme court has no original jurisdiction either at law or in equity. It can only review and correct those proceedings which have been passed upon by the court below.

Evidence of proceedings below, *dehors* the record, not admissible in the supreme court.

APPEAL *from Lee District Court.*

Opinion by GREENE, J. A motion is made by appellants to set aside, and declare void, the decree rendered in this case by the district court. In support of this motion, it is alleged that the decree is irregular, and abusive of the powers of that court; that the records were fraudulently taken from the Muscatine to the Lee district court; that the solicitor for complainant, who appeared and conducted the proceedings below had no authority to do so; that the proceedings under which the decree was rendered against complainants below were all fraudulent; and, that the trial was had without producing the evidence of complainants' rights, and without their knowledge or approbation. To establish these facts the appellants propose to submit a number of affidavits and the appellees propose to disprove the facts by counter affidavits.

The question arises, has this court power to entertain such an investigation? Are we authorized to resolve ourselves into a jury, hear evidence, determine what facts are proved, and decide an issue not submitted to the court below? The answer is obvious. We have no such jurisdiction. It is entirely foreign to the appellate and corrective powers, to which this court is limited by the constitution.

As a court, we have no original jurisdiction, either at law or in equity. We can only review and correct those proceedings which have been passed upon by the court below; and the only authentic evidence of those proceedings is the transcript of the record in each case. It has

been repeatedly decided that evidence of proceedings *dehors* the record. is not admissible, and that evidence or depositions, filed subsequent to the decision below, will be excluded.

But it is contended that this motion should be entertained, under the Code, § 1563, which declares that the supreme court has a general supervision over the district court, to prevent and correct abuses where no other remedy is given by law. Although this court may exercise a supervisory control over the district court, and over all inferior judicial tribunals, still that power must be exercised in the manner provided by law, and only to a supervisory extent. In a supervision of their proceedings, we can act only upon the proceedings themselves as evidenced by the record, and not, as they may be shown to us, by extrinsic proof.

The power given to this court, by the Code, to prevent and correct abuses, where no other remedy is provided, can confer no original jurisdiction. The constitution provides that "the supreme court shall have appellate jurisdiction *only* in all cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe." The general assembly may provide restrictions for the manner of exercising that exclusively appellate and corrective jurisdiction, but cannot enlarge it, nor confer an original power, which is so expressly inhibited by the constitution. This court, then, can only proceed to prevent and correct abuses in an appellate capacity, by a supervisory control over the very subject matter about which the abuse is charged.

Besides, the abuse complained of in this case, is not without remedy. If the decree was rendered under the fraudulent circumstances alleged, a court of chancery will afford relief.

Motion overruled.

J. C. Hall and *C. H. Phelps*, for appellants.

H. T. Reid, for appellees.

Laraby *v.* Reid.

To defeat a sheriff's deed under the revenue law of 1844, it may be shown that the assessment list was not filed before June 15th, 1844; that the county and territorial list was not returned before the first Monday in January, 1845; and that the owner of the land had personal property in 1844 and afterwards. Greene, J., *contra.*

Error *to Lee District Court.*

Opinion by Kinney, J. Reid sued Laraby in an action of right to secure certain lands described in his declaration. He relied upon the validity of a tax title deed. Having introduced the treaty of the 4th of August, 1834, between the United States and the Sac and Fox Indians, and the act of Congress of 30th of June, 1834, entitled "an act to relinquish the revisionary interest of the United States in a certain reservation lying between the rivers Mississippi and Des Moines," he then offered in evidence a deed dated on the 25th day of June, 1847, from Robert A. Russell, collector and treasurer for the county of Lee, which purported to convey the land in question to the plaintiff. This deed was made upon a sale for delinquent taxes for the year 1844. The defendant moved to exclude said deed as evidence of title because said order of sale therein recited, did not conform to the order prescribed by statute; but the court overruled the defendant's objection to which he excepted. The defendant then offered to show that the original assessment list was not filed in the office of the clerk of the county commissioner, on or before the fifteenth day of June, 1844, by the assessor, also that the levy of the tax of 1844, was unauthorized by law, also that the treasurer did not return his county and territorial list on or before the first Monday of January, 1845, also that there were in 1844 and afterwards, upon said premises personal property subject to execution and sale, sufficient to pay said taxes and

costs of 1844. To the admission of which evidence the plaintiff to each and every part thereof objected, and the court sustained the objection; to all of which defendant excepted. The court then instructed the jury that the papers and documents produced in evidence by the plaintiff showed that the legal title to the land in question was in the said plaintiff.

We think the court erred in excluding the testimony offered by the defendant. The collector's deed, at best, was but *prima facie* evidence of title, and the legality of all prior proceedings upon which it had to depend and rest for its vitality and support. The court should have permitted the evidence offered by defendant to rebut the *prima facie* case made by the deed, and to show that it had no foundation in law. The statute required certain things to be performed as conditions precedent to the sale and deed, none of which were conclusively proved by the recitals in the deed. If the defendant could show that any one of the essential requirements had not been observed by the officer, the sale was void; the deed mere waste paper.

In all cases of this kind the courts with great uniformity, have held that a rigid compliance with the essential provisions of the statute was necessary to impart title. No legal presumptions, or intendments are favored. 7 Wend. 148; 13 ib., 465; 20 ib., 241; 7 Cow., 88; 4 Hill, 81, 84, 86, 99; 2 Ind., 424; 4 Peter's R., 349; 7 Howd., 181; 9 Howd., 258; 4 Scam., 69.

But the defendant offered to prove that he had personal property subject to execution at the time the land was sold for taxes. This the court should have permitted. Laws of 1844, p. 34, §§ 37, 47. *Stead* v. *Course*, 2 Peter Cond., 153. In this case the court not only hold to the above doctrine, but say that the collector must act in conformity with the law from which his power is derived, and the *purchaser* is bound to inquire whether he has so acted. See also on the subject of the levy and sale of personal property,

Thatcher v. *Powell*, 5th Cond., 32, 33. *Gantlys, Lessee* v. *Ewing*, 3 Howd., 713; *Parker* v. *Smith*, 4 Black., 70. But as all the questions which are presented by this record, underwent a full examination by this court in the case of *Scott* v. *Babcock*,* recently decided, in the third district; it is not necessary to extend this opinion. The majority of the court are satisfied with that decision, which was made upon the most mature reflection, and after holding the case for several months under advisement.

Judgment reversed.

Dissenting Opinion by GREENE, J. The evidence offered against the sale and deed in this case was, I think, very properly ruled out by the court below, for two reasons.

1. If the party could prove the facts as he proposed, it could not invalidate the deed, because those facts would not indicate a material departure from the law; and the *parole* proof offered was in direct conflict with the records in the case.

2. The law expressly declares that "Sales made and deeds executed by treasurers as aforesaid shall have the same force and effect, and be of the same legal validity, as sales upon executions from district courts and deeds made by sheriffs upon such sales." Laws of 1844, 38, § 66. I regard the opinion in this case, and in *Scott* v. *Babcock*, as in direct conflict with the above section of the law and with the leading decisions in relation to judgment sales.

Geo. C. Dixon, for plaintiff in error.

H. T. Reid, pro se.

* *Ante* p. 133.

BRACE *v.* REID.

Judgment of partition, effectual and conclusive upon all persons whatsoever; and any fraud in such partition can only be avoided by him who had a prior interest in the estate, and not by him who, subsequent to such fraud, purchased such interest.

Where a petition seeks to set aside a judgment of partition for fraud, and where there were intermediate purchasers under the partition, notice of such fraud should be alleged against them as well as against the defendant.

A purchaser with notice will be protected if he derive title from a *bona-fide* purchaser without notice.

A trust will not be implied or presumed unless supported by strong circumstances showing that such trust was intended.

Where a petition seeks a recovery by virtue of a trust, it should be substantially charged with reasonable certainty.

A title made certain by a judgment of partition cannot be collaterally changed, nor can such judgment be impeached by the same petition which claim rights under it.

APPEAL *from Lee District Court.*

Opinion by GREENE, J. The petition in this case was filed under the Code, for the undivided half of share sixty, in the Half Breed lands in Lee county. The petition claims that Elizabeth Cardinal, as sister of E. Antaya, a Sac and Fox half breed, was in her lifetime entitled to a share in the Half Breed tract; that on her death she left several children, and among them Eustace and Julian; that all the children, except Julian, died previous to April 14, 1840, at which time the petition was filed for a partition of the tract; that the judgment of partition was rendered at the April term, 1841, of the district court, and at the October term, following, "the tract" was divided into one hundred and one shares, of which E. D. Ayres received a half share under E. Cardinal, through her son Eustace; that when said partition was made said Julian was a minor and a non-resident, had no notice, no guardian appointed, and that his rights were in no manner recognized by the partition, that

said half share was drawn by E. D. Ayres in his own wrong, and in fraud of the rights of Julian; that September 16, 1841, Ayres conveyed to O. S. H. Peck; that April 13, 1842, Peck conveyed to H. Taylor; that September 8, 1843, Taylor conveyed to J. Claypool; on 16th January, 1847, Claypool conveyed to H. T. Reid, and that Reid purchased with full notice of the rights and equities of Julian Cardinal. The petition states that February 25, 1848, Julian made a deed of the share to P. A. R. Brace and A. B. Coy, both of whom soon after died and left their wives and children their heirs and claimants in this proceeding. The petitioners claim that they are entitled to the half share purchased by Reid from Claypool, and to the rents and profits from the date of purchase. The record of partition is made a part of the petition. Defendant's demurrer to this petition was sustained. Several causes of demurrer are assigned.

1. Because the plaintiffs complain of a fraud against Julian Cardinal, from whom they claim to have purchased after the alleged fraud was committed, of which Julian himself never complained. This objection might not in all cases avoid the charge of fraud. But in a case like the present, where the complainants set up a mere naked, equitable and uncertain interest against a legal title fully and conclusively adjudicated, the party assigning such interest should have made some demonstration of right to the premises, something to show that he did not acquiesce in the judgment of the court, and did not abandon all right of possession or enjoyment of the premises. He should have asserted some right, not yielded, upon which his own claim could have rested, before a court of equity. We learn from Judge Story that "it has been laid down as a general rule that where an equitable interest is assigned, in order to give the assignee a *locus standi judicio* in a court of equity, the party assigning such right must have some substantial possession, and some capability of personal

enjoyment, and not a mere naked right to overset a legal instrument, to maintain a suit." 2 Story, Eq. Jur., § 1040, g.

The judgment of partition, from which Reid's title is derived, has at least the force of the most absolute "legal instrument," and as the petition, in this case, does not show that the assignor of complainants had any substantial possession or power of enjoyment, may not their power to maintain the suit be well questioned?

The proceedings in partition were open to all; no one was excluded from showing rights, or from controverting the rights of others. The great object of the proceeding was to ascertain the owners, whether infant or adult, and to adjudicate and award to each his share. The judgment of partition became "firm and effectual forever," and "conclusive upon all persons whatsoever." Rev. Stat. 463, §§ 35, 36; *Wright* v. *Marsh, et al.*, 2 G. Greene, 94, 110. Had the judgment been fraudulent or erroneous, the injured party had his remedy, either before the district court or on appeal to the supreme court. If fraudulent at all, it could only have been so between the parties to the judgment; and the injured party, alone, should be permitted to apply for the remedy. After such negligence, after it may be fairly presumed that the injured party has waived all objection, a subsequent purchaser should not be permitted to revive such dormant and doubtful rights. Interminable litigation should not be thus encouraged, either at law or in equity.

That a fraud can only be avoided by him who had a prior interest in the estate, and not by him who, subsequent to the fraud, purchased the estate, was recognized in *French* v. *Shotwell*, 5 John. Ch., 555, 565, as a principle of common law. *Upton* v. *Bassitt*, Co. Eliz. 445. If for the purpose of discouraging excessive controversy and groundless litigation, if to promote repose and security in titles, this has become a principle of law, its application to cases like the present cannot be questioned.

2. The petition is also objected to because it does not

allege notice of the fraud, to Peck, Taylor and Claypool, nor does it charge that they had any knowledge of the equities claimed for Julian Cardinal and his assigns. From the petition, it must be inferred that those persons through whom the defendant derived his title, were respectively innocent, *bona fide* purchasers, and grantors. It is only averred that Reid, the present owner, had notice of any conflicting interest. In this particular we consider the petition fatally defective. To make a *prima facie* case against Reid, all the grantors subsequent to Ayers should have been charged with notice.

The principle will not be controverted that a purchaser, with notice, will be protected, if he derived his title from a *bona fide* purchaser without notice. 1 Story, Eq. Jur., §§ 409, 410.

It was held in *Varick* v. *Briggs*, 6 Paige, 323, that a purchaser, with notice, who took title from a *bona fide* purchaser, entitled to protection, without notice, is himself entitled to protection against previous equities, which were invalid as against the innocent grantor.

But it is said in the case at bar, that Ayers was a trustee of Julian Cardinal, as shown by the written instrument under which Ayres claimed title in the partition suit, and that all subsequent purchasers were bound to take notice of that instrument. Even if this instrument created the relation of trustee and *cestui que trust* between Ayers and Julian, we are at a loss to know how this fact could impart notice to subsequent purchasers. The judgment of partition is conclusive without the instrument; it was introduced as evidence only, and may have conduced to establish Ayers' right to the interest awarded to him; but it did not in consequence become a part of the record and judgment, nor was it made a perpetual notice that Ayers' claim was confirmed on insufficient proof. It would be a strange anomaly, if such an exhibit, a mere paper, or matter of evidence in a case, should be invested with such publicity and

conclusiveness. It amounts to but little less than absurdity to say that all parties interested must go behind a final judgment, investigate the evidence and exhibits, and from them take notice that parties to the suit had entirely different rights from those established by the judgment.

In this case, however, that extraordinary course might be adopted without endangering the judgment, for the instrument referred to amounts to something more than a power of attorney. It gave Ayers not only the authority to prosecute and obtain the claim of E. Cardinal in the half breed tract, but he is also expressly authorised to "receive and take a legal title for his use and benefit of all my share of said land as one of the heirs of said Elizabeth Cardinal, and I do by these presents give, grant, bargain and sell to the said E. D. Ayers all my right and title to said land for his own proper use, behoof and benefit, for value received of him." This instrument makes no resert vation, it creates no trust estate. The grant is made absolute by unequivocal words, without any reservation of rights or equities to the grantor or any other person. If then this conveyance had been made matter of record so as to amount to constructive notice, it falls far short of showing the relation of *trustee* and *cestui que trust.* Under no rule of construction or inference of law can a trust be derived from that instrument. A trust will not be implied by law, nor be presumed by a court, only in cases of urgent necessity, supported by strong circumstances showing that a trust was intended by the parties.

We are therefore clearly of the opinion that the petition upon the question of notice to intervening purchasers is materially defective.

3. The petition is also defective in not showing the relation of *trustee,* and *cestui que trust,* between Cardinal and Ayers. As the complainants seek to recover by virtue of that relation, and as it is one that will not be inferred or

presumed, 2 Story Eq. Jur. § 1195 n. 2., it should be substantially charged with reasonable certainty. Code § 1734.

4. The petition shows that by the judgment of partition the title to the half share in question was confirmed in Ayers. It does not seek to set this judgment aside under a general nor even by a direct charge of fraud, *DeLouis* v. *Meek*, 2 G. Greene, 55, and still it collaterally seeks to change a title that was rendered absolute and conclusive by that judgment. This cannot be done. *Wright* v. *Marsh*, *Lee* and *Delavan*, 2 G. Greene, 94. Nor can a judgment be referred to and relied upon as evidence in support of a petition and still be impeached by it. 1 McLean, 175. See also, 2 Edwards' Ch. 261, 262; 7 John's Ch. 182; 2 Peters, 257; 3 ib. 193; 10 ib. 474; as to the conclusiveness of such judgments in collateral proceedings.

We conclude then that the court below did not err in sustaining the demurrer to the petition in this case.

Judgment affirmed.

Geo. C. Dixon and Smith & McKinley, for appellants.

H. T. Reid, pro se.

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PIGGOTT *v.* ADDICKS.

A petition to set aside a judgment is defective, unless it avers that the judgment is unjust and oppressive, and that there is a good defense.

The door of equity is open only to such as have been or may be injured, and the injury sustained or apprehended should be clearly set forth in the petition.

Where a party has a plain and adequate remedy at law, he cannot resort to chancery.

APPEAL *from the Lee District Court.*

Opinion by KINNEY, J. A judgment having been rendered in the court below in favor of Addicks, Van Dusen, and Smith, against Piggott in attachment proceeding, he filed a petition in chancery to set it aside, stating among other things that no service actual or constructive was ever made upon him; that one, William McLennin, a practising attorney of the court appeared without any authority and filed a demurrer which was the only appearance in the case on the part of the defendant. The petitioner also charges that the appearance of McLennin was at the especial instance and request of the attorneys for the plaintiff, they well knowing that one Thomas W. Claggett was the attorney for the defendant in the said attachment proceeding.

The petition was demurred to, and the following causes among others specially assigned.

"The petition does not state that the sum of money for which the judgment was rendered was not due to the plaintiffs, or that the judgment operated oppressively upon the defendant, or that he had any defence at law.

"The petition does not allege that the party resorted to his legal remedy, viz: a motion to set aside the judgment, and the petitioner has, and, had such remedy and can avail himself of it."

The demurrer was sustained, and as we think, correctly. Either of the causes of demurrer are fatal to the bill. Before the plaintiff should be permitted to set aside the judgment it was incumbent upon him to state in his petition that it was unjust, and that he did not owe the amount for

which judgment was rendered. There is no propriety in setting aside a judgment and opening the door for further litigation if the result is to be the same. Such a proceeding would only delay the creditor in the collection of an honest debt, and be of no possible advantage to the debtor.

If it had appeared by the showing of the plaintiff that he had a meritorious defense to the claim, or any part of it, and that he had been deprived of making such defense by the unauthorized appearance of an attorney, then upon a proper application, the court should have opened the judgment for the purpose of permitting such defense. But there is no pretence of defense, or that the judgment is not just, or that it could in any manner be reduced upon a second trial. The door of equity is only open to such as have been or may be injured, and before chancery will take jurisdiction, the injury sustained or apprehended should be clearly set forth in the petition. The appearance of McLennin as counsel, is *prima facie* evidence that he had authority from the defendant to do so, and before his act as counsel could be avoided it was necessary to show in the petition that an injury resulted from such appearance. This doctrine is well and ably settled in the case of *Denton* v. *Noyes*, 6 John. R., 295.

But the petitioner having a plain and adequate remedy at law, he cannot resort to chancery.

1st. He has a remedy against the attorney, and from aught that appears, he is able to respond to all damages which the plaintiff has sustained in consequence of an improper appearance. If from insolvency, or other cause, an adequate redress could not be obtained by proceeding against the attorney, and if there is no other legal remedy, then a court of equity, if the party has been injured, will afford relief. But as the court below has control of its own records, the party had a right, within any reasonable time, while the judgment remained unexecuted, and while there

were no intervening rights, to appear, and on a proper showing, have the judgment set aside.

Judgment affirmed.

Geo. C. Dixon, for appellant.

Lowe & Rankin, for appellee.

WISE *v.* RAY.*

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If a signature is applicable to the substance of the written agreement and is put there by the party or by his authority, it is good whether at the top, in the middle, or at the bottom of the instrument.

Where an instrument is written by R. and subscribed by W., and stipulates that W. has sold and agrees to deliver pork to R. at the place and price mentioned the undertaking is mutual.

APPEAL *from Lee District Court.*

Opinion by GREENE, J. Assumpsit by Francis S. Ray against James Wise. The written contract, on which suit is brought, is as follows:

"I have this day sold, and agree to deliver, to F. S. Ray, at Patterson, Timberman & Co.'s slaughter house, in Keokuk, five hundred strictly corn-fatted, merchantable hogs, at the following prices: For all hogs weighing one hundred and fifty pounds, up to one hundred and seventy-five pounds, two dollars; one hundred and seventy-five pounds up to two hundred pounds, two dollars and twenty-five cents; two hundred pounds and over, two dollars and seventy-five cents per hundred pounds net, all to be delivered by the 20th December next. This 21st day of November, 1850. JAMES WISE."

*Kinney, J., took no part in this decision.

Plea, general issue; verdict for the plaintiff, and damages assessed at eight hundred dollars.

Upon the trial several instructions were asked by defendant, and refused by the court; but these instructions mainly turn upon one point. It is objected that the instrument sued on is not a valid contract, that it is a mere memorandum signed by defendant alone, and contains no stipulation which binds plaintiff; that it is defective in not showing mutuality or consideration; that it does not come within the statute of frauds.

It is assumed, and not denied, that Ray's name, which appears in the body of the instrument, was proved on the trial to be in his own hand writing; and this proof would have been presumed in favor of the decision below, if nothing appeared in the record to the contrary.

The fact that Ray's signature is in the body of the memorandum, cannot impair his liability. It is a signing within the statute of frauds. If the terms of the contract are in writing, and the names of the parties appear, it is sufficient to satisfy the statute, without regarding form. The point is well settled, that it is immaterial in what part of a memorandum the name of a party appears. If applicable to the substance of the written agreement, and is put there by the party, or by his authority, it is good, whether at the top, in the middle, or at the bottom of the instrument. 2 Bos. and Pull., 238; 3 Atk., 503; *Clason* v. *Bailey*, 14 John., 486; *McComb* v. *Wright*, 4 John. Ch. R., 658, 661.

In *Penniman* v. *Hartshorn et al.*, 13 Mass., 87, a memorandum for the sale of merchandise was held to be binding upon the parties, whose signature was above and not below the body of the memorandum. The instrument was in these words:

"Hartshorn and Arnold of Providence. I have sold to the above gentlemen 39 bales upland cotton at 40 cents—60 days for approved security. SILAS PENNIMAN.

December 13th, 1813."

In deciding that Hartshorn and Arnold were liable on this instrument the court say: "It is well known that such a signing has been held good in instruments of much more importance and solemnity."

The memorandum in the present case is at least as strong, as mutual, as expressive of consideration as the above. The instrument expressly stipulates that Wise has sold and agrees to deliver the pork to Ray at the place and at the prices therein mentioned. The undertakings are mutual; the one is required to deliver and the other to take the pork under the agreement. This case then materially differs from that in 4 John., 236, in which defendant made a written memorandum giving plaintiff the refusal of a farm at a certain price. The plaintiff did not agree to buy the farm but if he did purchase he was to pay the price named.

That the memorandum in the present case is sufficient to bind both parties, is conclusively established by *Clason* v. *Bailey*, 14 John., 484, and the authorities cited by the court.

In a recent Vermont case it was decided that it is not necessary that the consideration should appear upon the face of the written contract, as it may be proved by *parole* or may be inferred from the terms and obvious import of the contract. It was also decided that accepting and adopting a written contract, by a party who has not put his name to it, binds such party the same as if he had signed the contract. *Patchin* v. *Swift*, 21 Verm., 292.

We conclude then, that the contract in the present case, is mutual and within the statute of frauds, and that the court did not err in refusing the instructions.

Judgment affirmed.

Hall & Phelps, for appellant.

Reeves & Miller and G. C. Dixon, for appellee.

ARMSTRONG *et al. v.* SCOTT *et al.*

A complainant cannot preclude respondent from answering under oath.

If a sworn answer is waived, it does not affect the right of respondent to file such answer, nor impair its weight as evidence.

Where a deed of trust provides that thirty days notice shall be given in some newspaper, prior to sale, the publication should be continued weekly until the thirty days has expired, between the first and last publication.

APPEAL *from Des Moines District Court.*

Opinion by KINNEY, J. Bill filed by Scott and Yeates against Armstrong and Noble *et al.*, to enjoin them from selling a part of lot number fifty-six, in the city of Burlington. Injunction issued, and by decree of the court made perpetual. Having carefully investigated all the facts in the case, as disclosed by the testimony of the respective witnesses, and finding that they fully sustain the decree, we will briefly notice two questions of law raised in the argument. 1st. The bill calls for a sworn answer from some of the defendants, but expressly waives an answer, under oath, from Armstrong and A. O. David. Armstrong files a sworn answer, and it is now contended that inasmuch as such answer was waived by the complainants, that it cannot be received as evidence. We do not so understand the law. The practice of waiving an answer under oath originated in the state of New York, by virtue of an express provision in the statute—*vide* N. Y. R. S., p. 175, § 44. This provision, Chancellor Walworth says, was incorporated in the revised statutes at his suggestion, and it introduced a new principle into the system of equity pleading. It was intended to leave it optional with the complainant to compel a discovery in aid of the suit, or to waive the oath of the defendant if the complainant was unwilling to rely upon his honesty, and chose to establish his claim by other evidence. *Burrus* v. *Looker*, 4 Paige, 227. Here is the origin of that practice which, we believe,

has to some extent been adopted in our state. It is purely statutory—an innovation upon long established chancery pleadings, and must be exclusively confined to those states that have adopted it by legislative enactment. It is not necessary, at this late period, to adduce reasons in support of the practice permitting the defendant to answer under oath, and such answer to be taken as testimony. We consider it a valuable feature in equity proceeding, and one that cannot be dispensed with without operating oppressively upon chancery defendants. Its antiquity, constituting as it does, one of the distinctive features between common law and chancery practice; the protection which it affords to those from whom discovery is sought; the only opportunity which it gives to purge the conscience; the continued acquiescence in such a practice, only interrupted by statute, are strong arguments in favor of its observance. We then lay down, as the settled doctrine, that a complainant cannot deprive a respondent from answering under oath. That notwithstanding such oath may be waived in the bill, yet he has a right to file a sworn answer, and such answer will be entitled to the same weight as evidence, as though the complainant called for an answer under oath. But admitting the answer of Armstrong as testimony, there is still sufficient evidence to justify the decree.

2d. It was by virtue of a deed of trust that the property was offered for sale. This sale, as before observed, was enjoined, and by decree of the court made perpetual. The deed of trust provides that the trustee shall first give thirty days notice, &c., in some newspaper published in the city of Burlington. But one publication was made, and the question is, whether the trustee was not bound to continue the publication in each weekly number of the paper until the thirty days had expired. This we believe to have been the intention of the parties. The notice should not only have been published thirty days before the day of sale, but such publication should have been continued. Suppose the

notice had only appeared in one copy of the paper, and suppressed in all the other issues, would it have been, in contemplation of law, a newspaper notice? and yet a notice thirty days prior to the time of sale might appear to have been given. The object of all such notices is to advise the public, and when the law requires notice to be published for a certain number of weeks before sale shall take place, it does not merely mean that after the first publication the officer shall be permitted to sell, if the necessary time has intervened. It is as indispensable that the publication should be continued, as that the required time should elapse.

The same construction should be given to this deed of trust. As there was but one publication, and no more, the trustee had no more power to sell than if he had not published at all. Thirty days should have elapsed between the first and last publication, as upon giving this notice depended his power to sell.

Decree affirmed.

David Rorer, for appellant.

H. W. Starr and *J. C. Hall*, for appellee.

McAuley *v.* State.

A party has no right to use force, unless really necessary to protect his possession or property.

An assault not justified by a mere suspicion or fear of an encroachment.

Error *to Henry District Court.*

Opinion by Greene, J. James McAuley was sued before a justice of the peace for an assault and battery on Leonard Farr. The defendant was found guilty and fined five

dollars. He took an appeal to the district court, where a verdict of guilty was again returned and a fine of five dollars assessed.

On request in behalf of the state, it appears that the court instructed the jury that "if Farr had a right to make improvements on the farm that would not interfere with the farming operations of McAuley, he had a right to enter on the farm for that purpose, and defendant had no right to resist him by force, if he came to make improvements, unless he actually commenced making improvements that interfered with said farming operations: and that if Farr had a right to enter on the farm for the purpose of making improvements, he had constructive possession, so far as relates to the making of said improvements." It is now asserted that the court erred in giving this instruction. The proposition is self-evident, that if a person has a right to enter a close for any given purpose, he cannot be treated as a trespasser unless he abuses that right. It does not appear from the record that Farr had attempted to go beyond the limit of his right. In that particular the argument of counsel is not sustained by the record.

The defendant below had no right to use force unless it was really necessary to protect his possession or to prevent an injury to his property. A fear or mere suspicion that Farr might encroach upon his possession could not justify the assault.

Judgment affirmed.

J. C. Hull, for plaintiff in error.

J. T. Morton, for the State.

LEWIS *et al. v.* MULL *et al.*

Where a recognizance is entered into before the clerk and approved by him, and is otherwise in compliance with the statute, it shall have the effect of a judgment confessed.

A bond under seal cannot operate as a judgment confessed, because it is not a recognizance as provided by statute.

ERROR *to Lee District Court.*

Opinion by KINNEY, J. Judgment was rendered in this case in the district court against Garry Lewis, whereupon he sued out a writ of error to the supreme court, and entered into a bond, himself as principal, with a number of individuals as sureties, conditioned that said Garry Lewis should prosecute said writ of error to effect and pay all money that might be thereon adjudged against him, and all damages that might be awarded, and otherwise abide the judgment of said court, &c. In such event the recognizance was to be void. In witness whereof the parties set their hands and seals, signed and sealed in due form by the principal and sureties. Dated, the 20th day of February, A. D., 1849. Approved and filed, 22nd day of February, 1849. P. H. Babcock, Clerk. The case came up to the supreme court, whereupon the judgment of the district court was affirmed, and *procedendo* awarded to the court below. Mull for the use of Sutliff, then sued out execution on the bond, the conditions of which we have given above, against the principal and sureties. The execution defendants came into court and filed their motion to quash the execution for the reason that it was improperly issued against said sureties. This motion the court overruled. Upon this ruling error is assigned, which raises the only question for our determination. In support

of the decision below it is contended by counsel for defendant in error, that the instrument given by Lewis and his sureties is a recognizance, and therefore as the conditions of it have not been kept and observed by Lewis that the parties to whom it was given had a right to issue execution upon it without first bringing suit. If the principal and his sureties had entered into such a recognizance as is required by statute in such cases, the position of counsel would be correct.

The statute provides that "no writ of error shall stay or supercede the execution upon any judgment of the district court, unless the party applying for the same, or some responsible person for him, shall enter into recognizance before the clerk of the court where the original judgment was rendered, with sufficient sureties, to be by said clerk approved, in twice the amount of the judgment rendered, conditioned that the plaintiff in error will prosecute such writ with effect," &c. The following section provides, "that such recognizance shall have the effect of a judgment confessed for the amount of the penalty, and shall be a lien upon the real estate of the recognizees in the county where the same is executed and filed, as ordinary judgments. Laws of 1844, pp. 7, 8, §§ 16, 17. We do not think that the instrument in this case is a recognizance in contemplation of the statute. The recognizance must be entered into before the clerk: that is, the parties must appear before that officer, and in his presence sign the recognizance, and then it must be approved by him and filed. The paper before us appears to have been signed and approved on different days, clearly repelling all presumption that the principal and sureties appeared before the clerk, and entered into it in his presence. The clerk cannot be presumed to be acquainted with the signatures of those whose names appear to such instrument, and hence the safety of the party, to whom such obligations are payable, requires that

the sureties shall sign the recognizance in the presence of the clerk, otherwise the door is opened for fraud to those who are base enough to resort to forgery for the purpose of superseding execution upon judgments obtained in the district court. It is plain, we think, from the language of the statute, that the legislature never intended that the recognizance should be signed out of doors, and then brought before the clerk for his approval. It is inconsistent with the legal signification of the obligation, that it should be entered into in any other manner than before a judicial officer. A recognizance is defined to be an acknowledgment, before some judicial officer, of a previous indebtedness. The statute has so far changed the common law upon this subject, as to permit it to be entered into upon a piece of paper, as is evident from the word "filed," instead of making it a matter of record. If it was not for this word "filed," nothing less than an acknowledgment of indebtedness, with the usual conditions entered of record before a judicial officer, would be a recognizance. But so far as to permit the recognizance to be written out and signed by the parties, and filed by the clerk, we are permitted by the statute to depart from the common law, but no farther. The instrument in this case, is in no sense a recognizance. The date of its execution and approval, upon different days, is not the only evidence against it, but it is in the usual form of a bond, and sealed by the parties making it. True, it is called a recognizance, but this is a misnomer, and cannot make it anything different from what it really is. In various decisions made by this court, we have kept up the distinction between bonds and recognizances, and one important distinction is that while the former are, and must of necessity be, under seal, the latter are not and need not be sealed by the parties making them.

As the instrument in this case is not a recognizance, it could not have the effect of a judgment confessed, or operate as a lien upon the property of those who signed it, and

hence the party had no right to sue out an execution, and the motion to quash should have been sustained.

Judgment reversed.

J. C. Hall, for plaintiff in error.

L. R. Reeves, for defendants.

WALKER *v.* STANNIS *et al.*

Land was sold on execution in July, 1844, for $21.43, the amount of clerk's and sheriff's fees, but the deed was not executed and recorded till November, 1848. An alias execution was issued on the same judgment in December, 1844, and was signed by the same person, as clerk, who bought under the first execution, and the same fee bill for which the land was first bid off was attached to and claimed under the alias execution. The land was sold under the alias to A. in February, 1845, and the deed executed to him in July, and recorded in August, 1846. It was proved that the plaintiff said soon after the first sale that he should abandon the purchase. Held that the court below was justified in charging the jury that title to the property was not in the plaintiff.

A party cannot object to testimony introduced by himself.

ERROR *to Lee District Court.*

Opinion by GREENE, J. An action of right by J. G. Walker against John Stannis and Solomon Booth. Plea general issue; verdict and judgment for the defendants, rendered in November, 1849.

On the trial the plaintiff read in evidence the record of a judgment in partition, showing title, to the premises in dispute, to be in John O'Rourke and Patrick Walsh. He also read a judgment rendered in Lee district court, against said O'Rourke, in favor of Wood & Abbott, on the 7th October, 1843, for the sum of $1,579.98, and an execution

dated June 14th, 1844, issued on said judgment. By the return it appears that the sheriff sold to the plaintiff, for the sum of $21.43, amount of clerk's and sheriff's fees, the undivided half of share thirty-nine, as designated in the partition of the Half Breed lands, which share includes the lots in controversy. Under this sale the deed was not executed until November 23, 1848, and filed for record on the same day.

The defendants read in evidence an alias execution issued on the same judgment, and signed by the plaintiff, as deputy clerk, dated December 4th, 1844. To this execution was attached a bill of the same clerk's and sheriff's fees, for which the land was bid off on the first execution.

The land was sold to James Abbott, on the alias execution, for $915, on the 8th February, 1845. The sheriff's deed was executed to Abbott, July 28, 1846, and filed for record on the 5th of August, following.

After the defendants closed their testimony, the plaintiff called H. T. Reid, Esq., as a witness, and he stated that he acted as attorney in obtaining judgment against O'Rourke, and that he purchased the property under the alias execution for Wood & Abbott. On cross-examination, by defendant's counsel, he further stated, that immediately after the purchase under the first execution, the plaintiff told him that he should abandon his purchase and would not take a deed.

At the request of defendant's counsel, the court instructed the jury that the evidence offered in the case showed that title was not in the plaintiff, at the commencement of this suit.

This instruction forms the principal objection urged to the proceedings below.

The plaintiff claims that Reid's testimony was improperly admitted. But plaintiff cannot, with propriety, object to testimony which he himself introduced. He wished to show that Reid was the attorney of Wood & Abbott, and

thereby had notice of the first execution sale. The defendants clearly had a right to elicite all he knew upon that subject by a cross-examination, on which it appears that he had notice of plaintiff's intention to abandon the purchase and not take a deed. The testimony of a witness cannot be excluded merely because he does not meet the expectations of the party who had him sworn.

There is no evidence tending to show that Abbott had actual or even constructive notice of any prior sale; no part of the judgment, in favor of Wood & Abbott, had been satisfied, no satisfaction was entered even for the clerk's and sheriff's fees, as they were claimed by the plaintiff himself, as deputy clerk, in issuing the second execution. The consideration money had not been paid, nor had the sheriff's deed been executed to the plaintiff at the time Abbott purchased. All the circumstances conduced to show that if there was a purchase under the first execution, it had been entirely abandoned by the plaintiff. If, then, Wood & Abbott had notice of the first sale through their attorney, Reid, they were, through the same medium, equally notified of its abandonment.

Abbott's title was perfected, and his deed duly recorded more than two years before the plaintiff obtained a deed from the sheriff. Abbott acquired a perfect legal title while plaintiff was sleeping on his assumed rights, and long before he made any effort to establish any title in himself.

In *Hopping* v. *Burnam*, 2 G. Greene, 39, we decided that a deed for land, which is first filed for record, will prevail over a prior executed deed without *actual* notice. But in this case Abbott's deed was not only first recorded, but it was first executed, and it is not pretended that he had *actual* notice of the first execution sale, and hence with much more reason should his deed prevail over the plaintiff's.

We conclude, then, that upon the face of the deeds, and the dates of the recording, and independent of Reid's testi-

mony, the court did not err in deciding that the title was out of the plaintiff.

Judgment affirmed.

Reeves & Miller, for plaintiff in error.

D. Rorer and *H. T. Reid*, for defendant.

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POWELL *et al. v.* SPAULDING *et al.*

Where there is unity of interest, as to the object to be attained by a bill in equity, the parties seeking redress may join in the same complaint.

Where the land of an intestate is in charge of an administrator, he may be made a joint party to a bill in chancery in relation to that land, the same as the real party in interest.

A bill is not multifarious where all the parties are interested in the same claim of right, and where the relief sought is of the same general character.

Where the exhibits referred to in a bill are matters of public record, they need not be filed in court.

A bill has equity, which seeks to set aside a judgment of partition on the ground of fraud, and alleges the fraud generally; and also specially charges the facts and circumstances of fraud, under which the complainants were wronged by the confederation of the parties, their agents and attorneys, and where those facts and circumstances shew not only actual but constructive fraud.

If any of the charges of fraud in a bill would be good at law, and such as would justify relief or discovery, a demurrer to the whole bill cannot be sustained.

Where a bill charges that cunning, deception, falsehood and artifice were used to circumvent, cheat and defraud complainants of their rights, in a judgment of partition, and charges that defendants practiced fraud and imposition upon the the court to procure such judgment, and where the charges indicate actual fraud in the judgment, a demurrer to the bill should not be sustained.

Where an attorney confesses judgment against a party, without authority, the party injured is entitled to relief in equity on the ground of fraud.

APPEAL *from Lee District Court.*

Opinion by WILLIAMS, C. J. Peter Powell and others, heirs, &c., by their next friend, Joseph Webster, filed their bill to October term, 1847, against Josiah Spaulding and others, in the district court of Lee county. The bill sets forth the several interests of the complainants, alleging that they are seized in fee as tenants in common, with a number of other persons mentioned in the bill, as far as known of all that tract of land known as, and commonly called, "the Sac and Fox Half Breed Reservation," situate in said county of Lee, lying immediately between the Mississippi and Des Moines rivers, and bounded on the north by a line commencing at the north-west corner of the state of Missouri, and running east to the Mississippi river. That by virtue of a treaty entered into August the 4th, 1824, between the United States and the Sac and Fox Indians, said tract of land was given to, and reserved for the use of the Half Breeds of the said Indians, who were to hold the same, and occupy it, subject to the same limitations and restrictions by which Indian lands were in general held; that by an act of congress, approved June 30th, 1834, the reversionary interest of the United States, in said land, was relinquished to, and became vested in said Half Breeds, with the right to dispose of the same by sale, devise or descent, according to the laws of the state of Missiouri. The bill also shows that Peter Powell, and the other complainants, at the time of the making of the partition of said Half Breed lands and the rendition of the judgment thereon, as well as before that time, were the owners in fee of shares, or parts of shares, in said lands, by purchase from the Half Breed Indians, which titles are set forth particularly with the names of the grantors, the dates of the conveyances, and the Half Breed Indians from

whom the several titles were derived; that the several deeds of conveyance, at the time of their several dates, or about the same, were duly recorded, except the deed from Samuel Brierly to Asa Gruell and Robert Gruell, remained unrecorded. The truth of the facts alleged is averred, and by reason thereof, the several plaintiffs claim legal and equitable right to the portions of said land, as stated by them respectively. After thus stating their several interests in the land, they proceed to charge that Josiah Spaulding, and others named in the bill as defendants, on the 14th of April, 1840, by and in the name of "Reid & Johnston," filed in the clerk's office of the district court, in and for the county of Lee, a petition, wherein they represent themselves as being seized in the aggregate in fee simple of 23½ full shares in the reservation or tract of land aforesaid; together with 5135 undivided acres of said tract, and one full share and one-sixth of a share in Keokuk, a village situate on said tract. It is also represented in said petition for partition, for that Euphrosine Antaya, and others named therein, and also other persons, whose names and residences were unknown to petitioners, were tenants in common with them in the said reserved tract of land. The petition concludes with a prayer for the partition or sale of the land, as justice or equity might require; that said petition for partition was filed in the district court of Lee county, on the 4th day of April, 1840, and a summons issued in behalf of said Spaulding and others, complainants, against said Antaya, and others, defendants, as named in said petition, requiring them to appear before said court on the 4th Monday of April, ensuing the date of the summons, to answer the petition, which summons was returned into the office of the clerk on or about the 16th of April, 1840, with the certificate that the defendant had not been found. Thereupon, a continuance, with an order of publication, was entered on the motion of the attorneys of complainants, and notice of the proceeding published in the newspapers of Burlington,

in Des Moines county, requiring the defendants, Antaya, and others, as well as all persons interested, to appear and answer the said petition in said district court, on the first Monday of October, 1840; that it did not appear that there was any publication of the notice in the county of Lee.

At April term of the court, 1841, several persons, who had not been made parties to the proceeding in partition, appeared and were admitted as defendants to the bill, and filed their answers. On the 8th day of May, 1841, being April term of said court, a decree—or judgment, as termed by the statute—was entered on the record of the court, for the partition of the land, wherein, among other matters, the following appears as a part of the decree:

"The said defendants having appeared by their counsel respectively, and filed their answers to the petition and stated and produced their respective claims, and exhibited their proofs of title, and in some cases the original conveyances, in others authentic copies of conveyances by which the same are held, and their said respective claims, and those of the petitioners by their counsels respectively being by consent submitted to the court for adjudication, and partition according to law; and the court being satisfied by sufficient proof that the publication required by an act entitled, 'An act to provide for the partition of real property,' has been duly made; and no other person known or unknown having appeared, and answered, the said petition, or produced, or made any claim or other objection to said partition; and the claims of the said parties now before the court, petitioners and defendants, and their respective proofs and conveyances being by the court heard and considered, it is therefore by the consideration of the court, and with the consent of said parties, this 8th day of May, 1841, ordered and adjudged that the claims and rights of said parties respectively to the undivided portion of the land mentioned and described in the said petition, amount in the whole to the number of one

hundred and one equal portions." The bill then proceeds and sets forth the names of these persons, parties to the proceeding in partition, to whom the land was apportioned by the decree, and the portions set off to each. After confirming the apportionment as made, it was further ordered and adjudged "that all other persons, whatever, should be thereafter barred and precluded from any title or claim in said lands."

Commissioners were appointed to divide the lands in compliance with the decree of the court, and make report of their acts for confirmation. At a subsequent term, on the 6th day of October, 1841, the commissioners made their report, which was confirmed. At the same time, a mistake having been discovered as to the number of shares into which the land had by the court been divided, a correction was made so as to decree that instead of one hundred and one, the number should be one hundred and two shares and one third of a share.

The bill then prays that the decree or judgment of the court together with the agreements, doings, &c., of the parties in relation thereto, and all proceedings thereon, "may be taken and considered as a part of this bill." It then charges that "the said proceedings and decree hereinbefore set forth by your orators, &c., are so tainted with fraud, irregularity, injustice and oppression as to render the same void, and of no force and effect, either in law or in equity." In support of this allegation of "fraud, irregularity, injustice and oppression," twenty-nine specifications of facts and circumstances are made. It is also charged that certain lands lying north of said Half Breed reservation, as the boundaries of said reservation were fixed by the treaty of 1824, and were, by the decree, given to the parties admitted to the benefit thereof, whereas said last mentioned land by an act of congress, approved June 15th, 1844, had been by the force and effect of said act added to said Half Breed reservation as new territory; and by

including said land in the decree, the court acted without jurisdiction thereof, and the same operated as a fraud upon the rights of the orators, &c.; that for this the decree is void.

The bill then proceeds with a statement that Isaac Galland and others have claims of interest in the land which were not included in the partition as made, and prays that they may be made parties defendant to this proceeding, as their interests are liable to be affected thereby. It also avers that most of the last named defendants to this bill reside in Lee county, and some of them, on the aforesaid Half Breed reservation or tract of land, farming and cultivating the same, whose claims and interests were known to the parties in said decree for partition at the date of the rendition of the same, yet their rights were not recognized, nor were their shares admitted in said decree. That several of the last named defendants having received notice of the pendency of said suit for partition, attended said April Term, 1841, of said district court, for the purpose of filing their respective answers in said suit, but were prevented from doing so, by being imposed upon, and misled by the false and fraudulent representations of the said parties in said decree, their agents and attorneys, or some of them, who falsely and fraudulently told them that no proceedings would be had in said suit at the said April term of said court, 1841."

The bill concludes as follows: "Nevertheless, so it is that said defendant to this bill who were admitted and had interests given them in said decrees of partition and confirmation, well knowing the premises aforesaid, but confederating and contriving how to injure, harrass and oppress your orators, &c., in the premises, and wholly to impoverish and ruin them, now pretend that the rights of your orators and oratrixes as tenants in common, or as owning any interests whatever in said lands, are barred and precluded forever by the decrees aforesaid;" and that

said defendants in the furtherance of their said fraudulent designs against your orators and oratrixes, also threaten to commence action at law against such of your orators, &c., as reside on said tract of land, for the purpose of turning them out of the possession and enjoyment of their said homes, all of which is contrary to equity, &c.

The prayer is that as the petitioners are without remedy at law, that the decrees so obtained and made may be declared fraudulent and void, that it be held for nought, that the rights and interests of the petitioners may be secured to them, as though no such decrees of partition and confirmation had ever been made. The usual and general prayer for relief is added.

The first special allegation of fraud is that the full interest of Isadore Antaya, a Half Breed of the Sac and Fox Indians, was admitted, allowed and given, by said decree of partition, to Patrick Walsh and Etienue Provost, notwithstanding said Walsh and Provost, and all the other parties in said decree, and their counsel, well knew that the date of the deed and purchase of said Antaya, under which said Walsh and Provost claimed said interest, was long subsequent in date of execution and delivery, and of the recording of the deed from said Antaya to said Duffield and Morrison, under which your orators and oratrixes, James, Mary, Ann, Sarah, Virginia and Philena Campbell, derived a portion of their interests in said land as is hereinbefore set forth.

Secondly. It is specially charged that two-thirds of the interest of Lizette Gerard, a Half Breed of the Sac and Fox Indians, is given by the decree to Greene Erskine, under a purchase from said Gerard, which was made long subsequent to the purchase of William C. Duffield and one Culbertson from said Gerard, under which said orators and oratrixes, James, Mary, Ann, Sarah, Virginia and Philena Campbell derive a portion of their interest in said land, as hereinbefore set forth.

Thirdly. That one-quarter of the share of Mary St. Amont, a Half Breed of the Sac and Fox Indians, as hereinbefore set forth, is admitted and given in said decree to William Overall, while the right of your orator, James May, to one-half of said share, as is hereinbefore shown, is not allowed, but is, in the language of said decree, "barred and precluded forever."

Fourth. That the interest of Therese St. Andre, a Half Breed of the Sac and Fox Indians, as hereinbefore stated, is the same interest under claim of which James L. Burtis, in his answer in the suit for partition, as aforesaid, derived his title, and was under such claim and title derived and given in the said decree one full share; whereas, your orator, James McMurray, who had a deed for a portion of the same share prior in legal and equitable right to that of the said Burtis—which was well known to said Burtis and the other parties in said decree—is nevertheless not mentioned in said decree, nor are his rights reserved.

Fifth. That said decree gives to John Wright one-quarter of a share which he claims to derive, by purchase, from one Isaac R. Campbell, who purchased of Charles Menard and Francois, his wife, said Francois being a Half Breed of the Sac and Fox Indians, as before mentioned, whilst the interest of your orators and oratrixes, the heirs of Abner Chalfaut, deceased, who own one undivided one-fourth of the same share, as before mentioned, is not recogn zed nor allowed in said decree, to any or either of the persons in whose hands said interest was vested, at the date of the said decree

Sixth. That at the time of the filing of the petition for partition, as aforesaid, your orators, Asa and Robert Gruell, Luther Barber and the heirs of Reuben S. Campbell, deceased, as aforesaid, were all living in said county of Lee, and on said Half Breed tract. That said Asa and Robert Gruell and Luther Barber had erected dwellings in which they resided, and made other and valuable improvements

on said lands, at and before the commencement of the suit for partition, as aforesaid, under the expectation and belief that the notoriety of their respective interests and possessions, would protect at all times, against the intrigues and machinations of speculators, and it is especially charged that the share and possessing rights of said Asa and Robert Gruell, Luther Barber, and the heirs of said Reuben S. Campbell, deceased, were well known to said Edward Johnston at the time of verifying and filing in said court said petition for partition. Yet were not the said Asa and Robert Gruell, Luther Barber, and the heirs of Reuben S. Campbell, deceased, named in said petition, nor were their rights regarded in the rendition of said decree of partition.

Seventh. That your orator, James May, at the time of the rendition of the decree of partition and confirmation, resided in Pennsylvania, where he still resides; that it was not until within the course of the year 1845, that he was informed of the proceedings in partition in reference to said lands, as aforesaid; that at the time of the making of said decree, and previously, said May had a portion of said land immediately adjoining Keokuk under cultivation, with a dwelling house and other valuable improvements thereon, which was well known to the parties in said petition, or some of them. That Mary St. Amont, a Half Breed of the Sac and Fox Indians, as hereinbefore shown, and generally known to be such, as well to the said Edward Johnson, as to the community generally, and under whom said May derives his said half share or interest in said lands, resided on said lands at, and long before the rendition of said decree of partition, which, with the consideration that his deed from said Mary St. Amont was recorded in the county of Lee, before the commencement of said suit for partition, induced said May to believe that nothing would be done in reference to said lands affecting his interests, unless he were first notified thereof, or if anything were done, that his interest would be recognized and protected.

Eighth. That your orator, Peter Powell, at and prior to the time of the rendition of the decree of partition, resided in the city of St. Louis, in the State of Missouri, but had no information of the pendency of said suit for the partition of the said tract of land, although a large number of those who have interests given to them in said decree, are his immediate neighbors, with many of whom he was, whilst the said suit for partition was in progress, in daily intercourse, and all or most of whom knew that he had a good interest and title in the said reservation or tract of land.

Ninth. That your orators and oratrixes, Dennis, Adeline and Joseph DeLaime, at the time of the rendition of said decree of partition, and long before, resided in the state of Illinois, about ten miles from St. Louis, and that the facts of their infancy, at the time of the rendition of said decree of partition, as well as their valid and subsisting interests in said lands, as hereinbefore shown, was then known to all or most of the parties admitted in said decree, their agents and counsel; yet said parties did not regard the rights and interests of said Dennis, Adeline and Joseph, as aforesaid; but by their covinous and deceitful practices misled said court to decree that their rights and interests should be barred and precluded forever.

Tenth. That a large majority of the shares and interests, in quantity and value, which were decreed and admitted in said decrees for partition and confirmation, were spurious, fictitious and fraudulent, and which facts were well known to the parties in said decrees for partition and confirmation, their agents and attorney at and before the time of rendition and recording of said decrees. And your orators, &c., further represent, and so allege the fact to be, that it was notoriously understood at, and long before the date of said decrees, that there were not in the aggregate over fifty full Half Breeds which were interested in said

reservation or tract of land, and entitled to be admitted in a decree for the partition thereof.

Eleventh. That the rendition of said decree of partition, in which so many and fraudulent interests were admitted, as aforesaid, was the result of a fraudulent and covinous combination of the parties in said decree, their agents and attorneys, who fraudulently and clandestinely assembled together in the tavern house of one William Wilson, in Fort Madison, on the 6th, 7th and 8th days of May, 1841, and then and there mutually and fraudulently agreed that said Half Breed tract or reservation, should, without regard to the rights of your orators, and of the other persons hereinbefore mentioned, who were unrepresented in said fraudulent proceedings, be divided and partitioned among themselves, in the aggregate amount of one hundred and one equal shares. That the parties in said decree, their agents and attorneys, in furtherance of their said fraudulent intent and designs, also agreed on the number of shares and portions of interests which should be decreed and given to the several persons and parties interested in, and consenting to said fraudulent arrangement; that said parties, in said decree, their agents and attorneys, while they were so fraudulently and clandestinely assembled, as aforesaid, and in furtherance of their said fraudulent intent and designs, prepared a draft of the form of the decree of partition, which they designed to have allowed by said court, in reference to said lands, and appeared in court on the day of the date of the rendition of said decree of partition, being the 8th day of May, 1841, at or about the hour of midnight, and then and there informed said court that the parties then before the said court, either in person or by their agents or attorneys, were the only persons whatsoever, which had, to their knowledge and belief, any share, shares, portions of shares, or other interest in said tract of land; whereby said court, being misled through the fraudulent and false representations of said parties, and supposing

said parties were acting in good faith, and not fraudulently, falsely and covinously, as is hereinbefore shown, did allow and order said decree for partition to be entered on the records of said court without any examination whatever, of the rights of said parties or their evidences of title, as in said decree of partition so prepared by the said parties therein, as aforesaid, is falsely set forth, and so your orators, &c., charge that said court, being so misled and imposed upon by said parties, their agents and counsel in said decree, did not hear, consider and adjudicate upon the respective proofs, claims and conveyances of said parties, as in said decree is fraudulently and falsely set forth.

Twelfth. That as further evidence of the fraud and confederacy of said parties in said decree of partition, your orators, &c., show that Reid and Johnston, attorneys for the complainants in said suit for partition, also appeared at the time of the rendition of said decree, as attorneys and agents for a large number of those who came in as defendants in said decree, as well as for the complainants.

Thirteenth. That the petition filed by said Spaulding and others, as aforesaid, was not verified by the affidavit of any or either of the complainants therein, as the statute, in such case provided, contemplates and requires, and is therefore fraudulent, as regards the rights of your orators, and did not give said court authority to act in the premises.

Fourteenth. That the statement in said petition, that the petitioners therein mentioned did not know the names or places of residence of such others as were interested in said lands, but who were not named in said petition in connection with the defendants therein named, is untrue, and your orators, &c., charge especially that said petitioners, or most of them, together with the said attorney, Edward Johnston, who swore to the truth of said petition, as hereinbefore shown, did know of the names and places of residence of your said orators and oratrixes, and of the respective

interests, or of the names of those under whom several of your orators, &c., claim as aforesaid.

Fifteenth. There was fraud in admitting, in said petition and said decree of partition, that Euphrosine Antaya was a Half Breed of the Sac and Fox Indians, and entitled to a full share in said lands, and yet taking advantage of said Euphrosine Antaya's absence from said court, by refusing and barring her of her said right, unless she should afterwards come in and prove said right by competent testimony.

Sixteenth. That the said parties in said decree acted fraudulently in reserving to themselves the interest of Euphrosine Antaya, and in not leaving her share to her sole disposal, as the statute, in the case of absent defendants and owners in cases of partition, contemplates and requires.

Seventeenth. There was fraud in said decree in not partitioning and dividing that portion of land lying immediately at the head of the rapids of the Mississippi, and included in the patent of said Thomas Reddick, and yet declaring that all persons, not parties to said decree, should be barred and precluded from any right or interest in said undivided premises.

Eighteenth. There was fraud and irregularity committed by the parties in said decree of partition, in not having a guardian *ad litem* appointed for the security and protection of the rights of those of your orators, &c., in said premises, who were infants at the time of the rendition of said decree.

Nineteenth. That many of the parties to said decree appeared as defendants, under the petition of said Spaulding and others, without there being any amended or supplimental petition in the premises, as is hereinbefore more particularly shown.

Twentieth. There was fraud in not making such of your orators, &c., as resided on the Half Breed tract of land,

parties to said petition, and in not noticing or preserving their rights in the decree of partition.

Twenty-first. There was fraud in not making such of your orators, &c., defendants to said petition of said Spaulding and others, and in not regarding their rights as owners of undivided interests in said lands in said decree of partition, whose deeds were recorded in said counties of Lee and Des Moines.

Twenty-second. There was fraud in the rendition of said decree of partition, in admitting and allowing portions of shares, and not reserving the balance of said shares for your orators who owned them, as is hereinbefore shown, or leaving the parts undisposed of, as in common for unknown owners.

Twenty-third. There was fraud in your orators, &c., not being made defendants in said suit for partition, their interests being known to the complainants in said partition, and and to all, or most of the parties, admitted in said decree of partition.

Twenty-fourth. That the quarter of a share admitted in said decree to said John Wright, and the full share admitted in said decree to Elizabeth De Louis, formerly Elizabeth Hunt, was admitted therein without their knowledge or consent; and that they did not employ said Reid and Johnston, as is falsely set forth on the record, to appear in court for them, or for either of them, as their respective attorneys for the support of their several rights; but that said Reid and Johnston, of their own accord, and by and with the consent and arrangement of the other parties in said decree, voluntarily appeared for said Wright and Hunt, for the purpose of inducing them to be quiet and submit to the gross fraud and villainies which said decrees perpetrated on the share-holders not admitted therein.

Twenty-fifth. There was fraud in not making your orators, &c., and other persons defendants or parties to said suit for partition, when it was known to the attorneys for the

complainants in said suit that they had valid and subsisting interests in said lands, or at least had deeds for the same.

Twenty-sixth. The court in the rendition of said decree of partition had no authority or jurisdiction to exempt specially from partition that portion of the Half Breed tract included within the patent issued to said Thomas F. Reddick, and therefore the portion of the tract included in the said patent remains in common to all the owners of the said reservation, and said decree, so far as it attempts to bar and preclude your orators from any right or interest in said exempted premises, operates as a fraud upon your orators and oratrixes, and is void.

Twenty-seventh. That at, and previous to the rendition of said decree of partition, and all of the parties admitted therein, as well as their respective attorneys, did know of the rights of your orators and oratrixes, Mary, Ann, Sarah and Philena Campbell, and Dennis, Adeline and Joseph DeLaime, as is herein before set forth, and that they were infants, without guardians, to protect their several shares and rights.

Twenty-eighth. That said parties in said decree of partition and their respective attorneys at the date of the rendition thereof, did know of the rights of all your orators, &c., as is hereinbefore set forth, and yet fraudulently concealed their respective rights from the knowledge of the court.

Twenty-ninth. That the petition and answers in said suit of said Spaulding and others show in many instances that said complainants and defendants therein claim under deed by virtue of antagonistical purchases from the said Half Breeds, and they are allowed in the decree of partition their interests thus adversely held and obtained.

This being the substance of the bill of the plaintiffs as originally filed in the suit. It was afterwards amended on leave given. The amended bill among other matters charged fraud upon the parties to a suit which had been commenced between the said parties to the decree of

partition of said Half Breed tract of land and other persons than the complainants in this proceeding, who claimed to be *bona fide* owners of shares or interests in the land, and who had not been admitted as participants in the benefits of the said decree, which suit was instituted by a bill in chancery, impeaching said decree for fraud, which was removed by a change of venue for trial to the district court of Muscatine county, and which was compromised and settled without final trial by the parties to the record thereof. The amended bill charges that said compromise and settlement was fraudulent and operated to the prejudice and injury of the rights and interests of the parties complainant in this suit, that said compromise was entered into and made without the knowledge of complainants. A multiplicity of exhibits, deeds, &c., are filed in the case as parts of the bill as evidence of the verity of the allegations thereof.

The defendants filed their demurrer to complainants bill and assign the following as causes of demurrer:

1st. The bill contains no equity to warrant any decree.

2d. The exhibits referred to are not filed.

3d. The bill shows that the complainants are barred by the decree of partition, and no sufficient ground of fraud is alleged.

4th. Fraud is generally charged, but the facts set out do not warrant the allegation.

5th. The Bill does not show that complainants have been defrauded.

6th. There is a misjoinder of the parties complainant.

The demurrer was sustained by the court below and judgment entered thereon, from which complainants appealed to this court.

This case is, in its general features, assimilated to the case of Wright impleaded with *DeLouis* v. *Meek et al.*,

tried in this court at December Term, 1849.* The bill seeks to impeach the same decree of partition on the ground of fraud. The principal facts upon which fraud is alleged are the same, and the pleadings in the court below in both cases are quite identical in substance and effect. The cases were both disposed of by judgment on demurrer, dismissing the bills for want of equity and other defects as alleged on trial by defendant's counsel. In this case as in the former the demurrer is in effect both general and special. On trial upon the appeal in this court, this cause was fully and ably argued, and much was urged upon the consideration of the court that need not be particularly discussed in this opinion, as the same questions have heretofore been substantially disposed of in the opinion delivered in the case of *DeLouis v. Meek* and others above referred to. To sustain the demurrer the counsel for the defendants relied on the following positions:

1st. The bill is multifarious.

2d. The exhibits are not on file.

3d. The complainants have no equity.

The questions raised by the counsel for the defendants in their first objection to the bill, that it is multifarious, is one which has given occasion to much research and learned disquisition among jurists. So various are the transactions among men, and such is the complication in which their interests become involved, in strife, that in view of the relation they hold to each other, it has been found to be difficult to establish any absolute rule of law, which will precisely define a proper line in jurisprudence, which, on the principle of multifariousness, may, by general application, operate safely in the advancement of right and the enforcement of justice. In support of this objection to the bill, the counsel for the defendants have cited Story's Eq. Pl., §§ 271, 272, 279, 509. The two first sections cited present the case of persons joining in an action where

* 2 G. Greene, 55.

the case of each particular party is entirely distinct and separate in the subject matter from that of the other defendants or parties. But in the same sections it is stated by that learned author, that "the case of one defendant may be so entire as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case, the objection of multifariousness could not be allowed to prevail." Section 279 merely shows that the objection of multifariousness on account of various defendants, applies also to an improper joinder of plaintiffs, who claim no common interests, but assert distinct and several claims against the same defendant. It is to be observed that on this subject, learned writers direct the legal mind to the case where the parties joined in the bill show a separate interest in the subject matter of the suit.

In the case of *Campbell* v. *Mackay*, 7 Sim. R., 574, referred to in the note to § 278, by Judge Story, among other things that are well said on this subject, the court delivering the opinion says: "To lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible." The cases are so various, as before observed, that the courts, in deciding them, seem to have been governed by what was convenient in view of the great ends of justice, rather than to establish any particular rule of an absolute nature. This question was fully discussed and decided in the case of *DeLouis* v. *Meek*, by this court. We have found nothing to induce us to change the position there assumed. The particular parties plaintiffs, referred to in the argument of defendant's counsel, as holding such position, in the case presented by the bill, as to furnish ground for this objection, although they set up title by separate deeds of conveyance, from different persons, derived from Half Breed persons of the Sac and Fox Indians, their several interests in the Half Breed lands are stated, and

they, in common with the other plaintiffs, complain of fraud in the rendering and confirming of the decree of partition, and seek by their bill to set it aside as an injury to their rights as *bona fide* owners of shares in the land. They, by the allegations of the bill, show an interest in common with the other plaintiffs or complainants, in the subject matter of the bill, and seek the same end; which is, that the decree, by the judgment of the law may be declared a nullity, on the ground of fraud. Moreover, in the procedure by trial to judgment throughout the case, there need be no incompatibility produced. The pleadings and the same issue must be alike applicable to all of the complainants. The case of *Campbell* v. *Mackay*, 7 Sim. R., 564, already cited, is, we think, quite in point here. That is a case where there were three instruments, under each of which the plaintiffs were entitled to a fund, and the defendants who demurred were all of them accounting parties, with the peculiarity that the defendants were not all parties to all the instruments, in respect of which the relief was sought. In the note, § 279, a case is cited, *Kensington* v. *White*, 3 Price, 164, in which a bill was filed by seventy-two, to restrain several actions on different policies effected upon different ships. The defendants, who sought by their bill to restrain the actions, were not only liable to several actions, but actually defendants in separate actions; yet they united in a bill against the plaintiffs in those actions, for the purpose of obtaining by one bill a discovery to aid in defending against all the actions, and that was held not to be multifarious.

After examining again the decisions of the courts, as far as we have been able to procure them, we feel constrained to adhere to the doctrine heretofore laid down by us in the case of *DeLouis* v. *Meek*.* The sum of the doctrine there advanced is, that "where there is unity in interest, as to the object to be attained by the bill, the parties seeking

*2 G. Greene, 55.

redress in chancery may join in the same complaint and maintain their action together."

The counsel for the defendant cites Story's Eq. Pl., 409, to show that "where the suit is joint, a want of interest, in either of the plaintiffs, is equally fatal." This principle they apply to one of the plaintiffs in this suit, George Collier, who was, by motion, substituted in the place of Peter Powell, one of the original plaintiffs, who died *pendente lite*. To this we reply, that, in a proceeding in chancery, such as this, although the suit seeks to establish a right in real estate, still where the estate of the intestate is in the legal custody of the administrator for settlement, we think he may be properly substituted for the purposes of the action. By proper legal procedure upon a failure of personal effects to pay the debts of the decedent, the real estate may be sold and the proceeds of the sale be in the hands of the administrator, to be appropriated in payment of the debts. We think, that for the purposes of this action, he may act as plaintiff, and that for this cause the bill is not demurrable.

In maintainance of this doctrine on the subject of multifariousness, we cite the following cases: Story's Eq. Pl., § 284, where it is laid down that "a bill is not to be treated as multifarious because it joins two good causes of complaint, growing out of the same transaction where all the defendants are interested in the same claim of right, and where the relief asked for, in relation to each, is of the same general character." See, also, Story's Eq. Pl., §§ 530, 531, 532, 533, 534, 539; *Ballantive* v. *Beall*, 3 Scam., 206; *Tarrick* v. *Smith*, 5 Paige, 560; *Bunkinhoff* v. *Brown*, 6 Johnson, Ch., 150; 2 Howard, Rep., 627, 641; 3 Howard, R., 411; 5 Howard, R., 131. We think the objection, on the ground of multifariousness, is not tenable.

2. The next ground of demurrer, that the exhibits are not on file, we think, cannot prevail; we deem the case in this respect as sufficiently before us. The deeds, &c., which are

not on file, were record matters, as referred to in the bill; and are in the usual manner, brought into court accompanying the bill. The proceedings in the suit, in relation to the same decree, being of record in the court and in its possession, open at the trial of this cause to the inspection and examination of the parties as well as the court, we think all the substantial purposes of the law are reasonably subserved.

3. The next ground of demurrer which we will consider is, that "the complainant's bill contains no equity to warrant any decree," and in connection with this, we will adopt the same course the counsel did who argued the case, by including the remaining causes of demurrer, as they amount to the same in substance. We have said already that the demurrer is general in its character, going in effect to the entire merits of complainants bill, and seeking to defeat their whole cause of action.

The bill seeks to set aside as void and of no effect the judgment of partition, and confirmation which by the judgment of the district court of Lee county, were entered on the records of said court on the 8th day of May, A. D., 1841, by which partition was made of the tract of land in said county, known as the Half Breed reservation. The bill charges that the decree or judgment of the court was obtained by the fraudulent confederation, and acts of the plaintiffs in the petition for partition upon which the decree was sought and obtained, together with others who united with them, and who with said petitioners are made and will be the beneficiaries thereof, to the injury of the complainants in this suit, if it be not set aside and declared void in law. The question presented by the demurrer is upon the equity of the bill of complaint as filed by the complainants. The bill is drawn at great length and with much skill, involving matter relating to various rights of many persons who claimed to be interested in the subject of the controversy. The lands on which the decree operates are of great value. The number of acres in the Half

Breed tract are estimated to be about one hundred and nineteen thousand. Many and important interests are involved. It is therefore of much importance that a proper legal adjustment of the rights of the parties interested or claiming to be so, should be had.

That fraud, when properly established, vitiates and renders void the most solemnly made contracts, and even the judgments of judicial tribunals, is an established principle of the law. Since the abolishment of the court of star chamber in the reign of Charles the First, a court of chancery is the great tribunal in which matters of fraud are properly cognizable in order to their thorough investigation, and the procurement of the most ample relief. The jurisdiction of this court in matters of fraud is peculiarly calculated for the investigation of the devices of men in using an agency so insiduous and subtle. The wisest and most learned jurists of the past time have failed to give a definition of fraud in the extensive signification, in which that term is used by the courts of equity. We again, as we have in a former opinion, adopt the language of Judge Story in his work on Equity Jurisprudence, p. 196, § 186, where he says, in speaking of courts of equity: "These courts have very wisely, never laid down as a general proposition what shall constitute fraud, or any general rule, beyond which they will not go upon the ground of fraud, lest other means of avoiding the equity of the courts should be found out. Fraud is more odious than force." Fraud is considered by this learned commentator, under two heads — positive or actual, and constructive fraud. The first, where there is an intention to commit a cheat or deceit upon another to his injury; and the latter, of which there is a large class, which are established by legal implication. "Fraud, indeed, in the sense of a court of equity properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by

which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud, to set aside acts done, but will also, if by fraud acts have been prevented from being done by the parties, interfere and treat the case exactly as if the act had been done."

Lord Hardwick is quoted by Judge Story's Equity Jur § 188, p. 198, as follows: "After remarking that a court of equity has an undoubted jurisdiction to relieve against every species of fraud, proceeded to give the following enumeration of frauds:

"Firstly. Fraud, which is *dolus malus*, may be actual arising from facts and circumstances of imposition, which the plainest case. Secondly. It may be apparent from the intrinsic nature and subject of the bargain itself, such as a man in his senses, and not under delusion, would make, on the one hand, and as no honest and fair man would accept on the other, which are unequitable and unconscientious bargains, and of such even the common law has taken notice. Thirdly. Fraud, which may be presumed from the condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the court of chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance. Fourthly. Fraud may be collected and inferred, in consideration of the court of chancery, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. Fifthly. Fraud in what are called catching bargains with heirs, reversioners, or expectants in the life of the parents, which, indeed, seems to fall under one or more of the preceding heads."

Where there is a *suggestio falsi*, as when a party unten

tionally and by design misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is fraud—in the truest sense of the term, there is an evil act with an evil intent. And the misrepresentation may be as well by deeds or acts as by words, by artifices to mislead as well as by positive assertion. Story's Eq. Jur., p. 201, §§ 192, 193; 4 Wash. C. C. R. 678; 1 Peters, 785. "Whether the party, thus misrepresenting a fact, knew it to be false, or made the assertion without knowing it to be true or false, is wholly immaterial, it is equally conclusive; for it operates as a surprise and imposition on the other." The misrepresentation must be as to matter of materiality where confidence is reposed, and the party complaining must be misled to his injury by it. Such fraud and damage coupled together will entitle the injured party to relief in any court of justice. Fraud by *suppresio veri* is also a proper subject for investigation in a court of chancery, and when established by positive and direct or circumstantial evidence, the court will administer relief to the injured party. It consists in the suppression of material facts, which one party, under the circumstances, is bound in conscience and duty to disclose to the other; and in respect to which he cannot, innocently, be silent. This species of fraud is defined by Judge Story, in his Equity Jurisprudence, to be in the sense of a court of equity, "the non disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate, and which the other party has a right, not merely in *foro conscientiæ*, but *juris et de jure*, to know." § 207.

Now, how does the case at bar, as presented by the bill of the plaintiffs, and the demurrer of the defendants, stand, in view of the principles of equity here advanced? The bill alleges fraud generally, in the procurement of the

decree, on the part of the petitioners for partition, their agents and attorneys. It also, satisfactorily, for the purposes of legal investigation, sets forth the character and amount of their claims to interest in the tract of land which is the subject of the decree. It furthermore alleges fraud specially, by setting forth the particular facts and circumstances in which the fraud consists, and by which the complainants have been, respectively, deprived of their rights by the fraudulent confederation and acts of the petitioner's partition, and their agents and attorneys, in the procurement of the said decree of partition. The bill charges fraud upon the defendants, actual and constructive. If any of the charges or specifications, contained in the bill, are good in law, and by reason thereof the plaintiffs are entitled to relief or discovery, the demurrer which goes to the whole cannot be sustained. 9 Peters, R., 632, 658; 1 John. Ch. R., 57; 5 John. Ch. R., 186.

The bill, by its allegations, shows that the several complainants, before and at the time of the procurement and making of the decree, were the *bona fide* owners of shares, or parts of shares, in the Half Breed tract of land; that a large majority of the shares and interests, in quantity and value, which were decreed and admitted in said decrees of partition and confirmation, were spurious, fictitious and fraudulent, that this fact was well known to the parties in said decree, their agents and attorneys, at and before the time of the rendition thereof; and that it was well known that there were not more than fifty full Half Breed shares in said tract of land, which should have been included in said decree of partition. This, together with the eleventh, eighteenth and twenty-fourth specifications of fraud, considered in connection with the other facts to which they relate, and which enter into them as ingredients, contains good and substantial ground of fraud, properly cognizable in a court of chancery; and which, if duly proved, would

entitle the complainants to the relief prayed for in the bill. The bill, in these specifications, clearly charges that the defendants used cunning, deception, falsehood and artifice to circumvent, cheat, and deceive the complainants, who claim to be *bona fide* owners of the interests in the Half Breed tract of land, by the procurement of the decree of partition and confirmation thereof; and further, that imposition and fraud were practiced upon the court so as to procure the decree to be entered, without examination, in form and substance, as it had been by the parties, their agents and attorneys, clandestinely and fraudulently made up. Here, then, are charges involving facts and circumstances which not only afford a strong presumption, amounting to constructive, but establishing ground for actual fraud. See Story's Eq. § 190, and same author, as heretofore cited.

As to the allegation that Reid and Johnston appeared for Wright and others, defendants in the suit for partition, and in making the compromise upon which the decree was made, without authority from them to do so, and the fraudulent design with which it is averred they appeared, we refer to the case of *DeLouis* v. *Meek*, 2 G. Greene, 55, where this matter has been, by this court, adjudicated; and to *Holker* v. *Parker*, 7 Cranch., 436, Story's Eq. Jur., p. 326, § 133; *Truett* v. *Wainwright*, 4 Gilman, 420; *McCarver* v. *Neally*, 1 G. Greene, 360; *Hopkins* v. *Mallard*, ib. 117.

Attorneys cannot, without authority from their clients, make contracts or compromises which will operate injuriously upon them; much less can they be allowed to appear and act for them, without authority from them to do so, to their injury. For such acts courts of chancery will afford relief. The effect of this point, so far as this bill is concerned, would amount to a fraud upon Wright, if he were a complainant, showing that he was injured by the decree and seeking redress. It can only be available to those who are complainants in this action.

As to the manner in which the facts and circumstances on which the plaintiff's rely for the maintenance of their suit, much had been presented, and ably urged by the counsel for the defendants, to show that the demurrer should be sustained by this court and the bill dismissed. Nevertheless, we consider that the bill must be sustained, and the defendants requested to answer to it by a trial on its merits, before the proper tribunal. The conclusion to which this court has arrived, we think, is fully sustained by the opinion delivered in the case of *De Louis* v. *Meek*, and the authorities there cited. Story's Eq. Pl., § 28; *Whelan* v. *Whelan*, 3 Cowan, 57; 6 How., 120; *Nesmith et al.* v. *Calvert*, Wood and Menot, 44; *Smith* v. *Burnham*, 2 Sumner R., 612; *Jenkins* v. *Eldridge*, 3 Story R. 181.

The other matters charged in the bill as fraudulent, and which we have not particularly discussed in this opinion, we have omitted to notice, deeming it unnecessary, as we consider them merely as irregularities, which should have been presented to the proper supervisory tribunal as error, there to be corrected in accordance with the principles of law.

The judgment of the district court is reversed, and the cause remanded for trial.

Judgment reversed.

J. C. Hall and *C. H. Phelps*, for appellants.

H. T. Reid, for appellee.

MICHALES *v.* HINE.

A district judge cannot delegate his official authority to another, nor adopt the acts of an attorney upon the bench, as the judicial acts of the court; nor can such authority be conferred by agreement of the parties to a suit.

ERROR *to Lee District Court.*

Opinion by KINNEY, J. It appears that the parties in this case, filed a written agreement, substituting James H. Cowles, Esq., special judge in the place of the Hon. George H. Williams, who was before his election counsel for one of the parties. In pursuance of the agreement, which is entered of record, said Cowles acted in the capacity of judge in trying the case, and gave written instructions to the jury over his own signature.

Parties cannot create a judicial officer, nor clothe persons by any agreement, however solemn, with the high prerogatives which alone belong to a regular constituted court; neither can the court itself delegate any of its powers to another; or adopt the acts of a stranger on the bench, as the judicial acts of the court. Whenever it appears from the record that the duties which belong to the court conducting the trial of a cause have been attempted to be exercised by any person other than a judge, an error is at once disclosed, sufficient to reverse, although the case may be free from error in other respects; and although the instructions to the jury, by the person substituted, may contain sound law.

The judgment is therefore reversed and the case remanded to the district court of Van Buren county for trial.

Judgment reversed.

C. Mason and *J. W. Rankin* for plaintiff in error

J. C. Hall for defendant.

WISE *et al. v.* PATTERSON *et al.*

A stranger to the suit cannot release and indemnify a party to the record so as to make him a competent witness for his co-partners.

APPEAL *from Henry District Court.*

Opinion by GREENE, J. This was an action of assumpsit commenced by Patterson, Timberman & Co., against Wise & King and Wise & Mathews, on a contract to furnish hogs. The plaintiffs recovered a verdict and judgment for $1769 79.

It appears that on the trial the plaintiffs introduced as witness M. P. Sharts, who disclosed on his *voire dire*, that at the time the contract was made and at the commencement of this suit he was a member of the firm of Patterson, Timberman & Co., but that before trial, he had sold his interest in the firm to C. F. Conn, who had executed a bond of indemnity to him. The defendants objected to the competency of the witness, but the court overruled the objection and admitted the testimony in behalf of the plaintiff. This is claimed to be erroneous.

Sharts was not only a party to the contract on which suit is brought, but is also a party to the record. He must, then, be regarded as "a person who has a direct, certain, legal interest in the suit." The fact that he had sold his interest in the firm and had received a bond of indemnity from Conn, a stranger to the record, does not remove his legal interest. He was still a party, liable at least for costs.

Besides, in the sale to Conn, was not Sharts' interest in this demand against the defendants so transferred as to leave an implied undertaking on the part of Sharts to make the claim good, and thus by charging the defendants the witness would exhonerate himself?

But it is clear that a third party could not so release a party to the suit as to render him a competent witness. He would still be not only liable for costs, but also a party to the record.

In *Scott* v. *Lloyd*, 12 Peters, 145, it was held that the rule by which the party to the record may be released so as to render him a competent witness holds out a strong temptation to perjury, and is not sustained by principle or authority. In the supreme court of the United States it has been uniformily assumed that a witness is rendered incompetent by being a party to the record. *De Wolf* v. *Johnson*, 10 Wheaton, 367, 384; *Stein* v. *Bowman*, 13 Peters, 209. *Bridges* v. *Armorn*, 5 Howard, 91.

Judgment reversed.

J. C. Hall, for appellants.

Reeves & Miller, for appellees.

WRIGHT *v.* MEEK *et al.*

Where a bill was filed to set aside a judgment in partition for fraud, and *pendente lite*, the complainant transferred his interest to his children, held that such transfer could not be pleaded in bar to the proceeding.

A plea in bar not allowed in chancery, if it depends upon facts which have transpired since the filing of the bill. GREENE, J., *contra*.

Where the complainant transferred his equity subsequent to the filing of the bill, the purchasers may become complainants by supplemental bill.

The doctrine of champerty and maintenance not applicable to this State.

IN EQUITY. *Appeal from Lee District Court.*

Opinion by KINNEY, J. John Wright filed a bill in chancery against Meek and others, charging fraud in the rendition of a decree in partition, and stating among other things, that he had a good and valid title, regularly derived from the Half Breeds of the Sac and Fox Indians, to a

portion of the land decreed and partitioned to others. A demurrer was interposed and sustained to this bill in the district court. This court having reversed the decision sustaining the demurrer, and the cause having been remanded for further proceedings, Edward Kilbourne, one of the defendants, filed the following plea:

"This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint, mentioned and contained to be true, in such sort, manner, and form as the same are therein set forth and alleged, for plea to said bill, says: that since the filing of said bill, that is to say, on the 22d day of February, 1847, the said complainant in consideration of the sum of one hundred dollars, and of natural love and affection, by certain deed of conveyance of that date, signed and sealed by the said complainant, together with Nancy Wright, his wife, a copy of which is ready to be produced to this honorable court, did bargain, sell and confirm unto James Wright, Alexander M. Wright, Ferguson Wright, Mitchel D. Wright, Joseph T. Wright, Campbell Wright, and Matthew H. Wright, and their heirs and assigns forever, all his interest and estate in and to the land mentioned in the said bill. Therefore this defendant pleads the said conveyance in bar of the said bill, and demands the judgment of this honorable court, whether he shall be compelled to answer the same."

This plea was allowed by the court to be a good and sufficient plea in bar of said suit. From this decision the complainant appealed. To supply a diminution of record which was suggested in this court, the following agreement was entered into by the council of the respective parties: It is agreed that after the plea filed by the said Edward Kilbourne was allowed as a good and sufficient bar, the complainant prayed the court below for leave to file a supplemental and amended bill, setting forth that John Wright conveyed all his interest in the land described in his

original bill as alleged in the plea of the said Edward Kilbourne, and that said conveyance was made for no other consideration than love and affection, and for the purpose of settling the land upon the said grantees, his children; that James Wright, Alexander M. Wright, Matthew W. Wright, Joseph Wright and Campbell Wright, a part of his said grantees, on the 16th day of March, A. D., 1850, re-conveyed for a good consideration, to him the said John Wright, for the purpose of enabling him, the said John, to carry on this suit, and that Ferguson and Mitchel D. Wright, two of his said grantees, had not re-conveyed the interest acquired from said John and praying that Ferguson and Mitchel D. Wright be made parties complainants with said John, by virtue of their said interest in said land. That the court refused to allow such supplemental and amended bill to be filed on the ground that the reconveyance made to complainant, John Wright, by a portion of his said grantees, would be no defence to answer to the matters set up by said plea, and secondly, that said Ferguson and Mitchel D. Wright could not become parties complainants by reason of anything in the proposed supplemental and amended bill averred and set forth."

The facts contained in this agreement form an important part of the record in this case. The first question presented by this record is, was the plea properly allowed by the court as a plea in bar? 'Although the court erred in not permitting the assignees who had re-conveyed to be made parties complainants, yet as the plea alleged an entire alienation of interest *pendente lite*, and it remaining unanswered, we were inclined to the opinion that the court were right in allowing it as a bar, not on the ground of champerty, which we will hereafter notice, but because there is not any person who had any interest to prosecute the suit; but on a careful and attentive examination of all the authorities at all analagous to the case under consideration, we are satisfied that a transfer of interest either involuntarily, by operation of

law, or voluntarily, would not operate as an unconditional bar to the prosecution of the suit. We have not been able, after much research, to find a single case where on alienation of interest *pendente lite* either voluntary or involuntary, a plea in bar in chancery on that account has been allowed as a good plea. The numerous class of cases of transfer of interest during pendency of suit is by operation of law in cases of bankruptcy, although there is a distinction drawn by some of the elementary writers, and also by courts, between this class of cases and that of voluntary alienation; yet the principle involved in the two cases is the same, and the rule applicable to the one is alike applicable to the other. In the former case, the alienation of interest by operation of law, is as perfect and complete as the latter. The assignee in bankruptcy occupies the same position to the bankrupt and adverse party as the asignee under a voluntary transfer of interest does to the assignor and the defendants. In both these classes of cases we do not find any authority which goes so far as to regard the alienation as a bar, but rather as so affecting the suit as to make it necessary for the assignee to be made party; and if this is not done within a reasonable time the suit will be dismissed.

The case of *Massey* v. *Gilleland*, 1 Paige C. R. 644, was a case where the complainants became insolvent pending the suit, and assigned all their interest therein to a third person, and the suit was continued for the benefit of such third person; the chancellor upon application required that the complainants or assignees should give security for costs to the defendant within a certain time or the bill would be dismissed. True the assignment in this case was not pleaded, but it was presented to the court by petition with a prayer for security of costs. If such transfer of interest operated absolutely as a bar, we think the learned chancellor would have given an intimation of it in his opinion.

The case of *Williams* v. *Kinder*, 4 Vesey, 386, we think fully sustains the view we have taken of this question. By a former decree the cause was referred to a master to take

certain accounts. Before the accounts were gone through, the plaintiff took the benefit of the insolvent act, and assignees were appointed, to whom his estate and effects were assigned by the clerk of the peace in whom his property first vested under the act. A motion was made on the part of the defendants to stay proceedings until a supplemental bill should be filed by the assignees. This was resisted on the ground that the case should go on by the assignees giving security for costs. The lord chancellor in deciding this question, draws a very sensible distinction between cases at law, where the plaintiff becomes bankrupt, and cases in chancery, and decides that in the former the cause will proceed on giving security for costs; but that in the latter, the assignees must file a bill. He adds that there is no other way for them to come into court. If a plaintiff at law becomes bankrupt, the defendant can lose nothing but his costs. There can be no judgment against the plaintiff but the costs. In that case, therefore, if there are further proceedings, all that is necessary is to get security for costs. But in this court more is necessary. A plaintiff in equity may have a decree against him for an account and to pay the balance. "I must have before me, therefore," says he, "in a cause in equity a substantive plaintiff who may abide such decrees as may be made." It will be recollected that in the case of *Massey* v. *Gilleland* the only question was upon the complainant or assignee giving security for costs, and the question whether the assignee should be made a party did not arise. The defendant was satisfied with security for costs. But it is worthy of remark that in neither of these cases does it appear to have occurred to the counsel or the court, that the voluntary assignment after insolvency in the one case, or the assignment by operation of law in the other would operate as a bar to the suit; but in the case of *De Menckivitz* v. *Ulney*, 16 Vesey, 466, the question was directly decided by a plea in bar. A bill for a specific performance was filed. The defendant

pleaded that by an act of Parliament, 49 Geo. 3, for the relief of insolvent debtors, it was enacted that any person who on the first of February, 1809, was charged in person for any debt, which did not in the whole amount to a greater sum than £2,000, should be discharged, and that all the estate, title, right and interest, and trust of such debtor in real and personal assets should be vested in the clerk of the peace. The plea contains the usual averments that the plaintiff was discharged under the act, &c.; that all his real and personal property became vested in the clerk of the peace and remained in him, and concludes by pleading the act in bar.

In this case the complainant obtained relief of the Insolvent Act after filing his bill *pendente lite*, and the bill prayed for a specific performance by which the complainant was to come into possession of valuable real estate. The act unconditionally divested him of all his interest in all his real and personal estate and invested it in the clerk of the peace. A voluntary assignment could not be more complete. The act was pleaded in bar, and Lord Chancellor Elden in delivering his opinion says: "The defendant could not get over the fact that these circumstances did not exist when the bill was filed, and the consequence is that the assignee under the act, clerk of the peace or assignee, must come in by supplemental suit."

The plea was accordingly overruled. This is the only adjudicated case we have been able to find in point, and indeed the only one which has fallen under our notice where a transfer of interest *pendente lite*, either by operation of law or voluntary, has afforded matter for a plea in bar, the Lord Chancellor overruled the plea on the ground that the circumstances did not exist at the time the bill was filed, and consequently the matter contained in the plea having transpired since the filing of the bill, it would not operate as a bar. We think that it may be safely asserted as a correct rule, that a plea in chancery should never be allowed as a bar if it depends for its basis upon

facts which have transpired since the filing of the bill. Pleas in bar are not necessarily predicated upon matter recorded or as of record, in a court of equity, or any other court, but may be founded on matters *in pais;* but such matters must have an existence before the filing of the bill, in order to make them available by plea in bar. These may be stated accounts, an award, a release, a will, or conveyance, &c.

Having shown from the authorities that a transfer of interest *pendente lite* either by operation of law or voluntary, will not bar the suit, and therefore should not be pleaded as such; we will now consider the effect of such transfer, and the remedy of the party affected by it. The great leading American case on this subject, is that of *Sedgwick* v. *Cleaveland*, 7 Paige, 287, from which we will quote at some length. A judgment creditor's bill had been filed against Sedgwick, the complainant in this suit, before the vice chancellor, at the suit of Thomas and Card, and an order for the appointment of a reciever had been made in that suit, under which the complainant, Sedgwick, made a general assignment of all his property, effects, and things in action, both legal and equitable, to the receiver in the suit before the vice chancellor. The counsel for Cleaveland demand the right of the complainant to proceed in the suit.

Chancellor Walworth in his opinion says: If this had been a case of an assignment by the complainant under the insolvent act, there could have been no possible doubt that the suit had abated, or rather that it had become so defective that the complainant could not proceed any further in his own name against the defendant, if the latter had thought proper to raise the objection. The court requires the real parties in interest to bring the suit, except in certain cases when the complainant represents the rights of those for whom the suit is brought, both legally and equitably, as in the case of executors, or trustees, or assignees under

the insolvent acts. And when the sole complainant who originally brought the suit in his own name, and no *auter droit*, is discharged under the insolvent acts, and makes an assignment of his property for the benefit of his creditors, the assignee must be made a party before the suit can be further proceeded in; *Williams* v. *Kinder*, 4 Vesey R. 387. The proper course for the defendant in such a case if he wish to have the suit proceeded in, or put an end to, is to apply to the court for an order that the assignee file a supplemental bill, in the nature of a bill of revivor, within such time as shall be prescribed by the court for that purpose, or that the complainant's bill be dismissed; and notice of such application should be served on the assignee as well as upon the complainant in the original suit; *Porter* v. *Cox*, 5 Mad., R. 80. In the case *Yare* v. *Young*, 9 Wend. R. 649, the principle that the suit becomes defective in such a case and cannot be proceeded in, if objected to by the defendant, until the assignees are brought before the court, is distinctly recognized. It is proper also to remark that in case of an assignment under the bankrupt or insolvent act, the suit is not strictly abated even as to the complainant; but it merely becomes so defective that he cannot proceed therein until the assignee is brought before the court; and the assignee becomes so far the legal and the equitable representative of the rights of the complainant, that upon a new and supplemental bill, in the nature of a bill of revivor and supplement, being filed by the assignee to continue the proceeding in his own name, it is not necessary to make the former complainant a party thereto, which would be necessary in case of an assignment of only a part of the interest of the complainant in the subject matter of the suit. The learned Chancellor further says: "That where a party who has assigned the whole or a part of his interest in the subject matter of the suit attempts to take any active proceeding therein, the adverse party may object to such

proceeding on the ground that the suit has become abated or defective as to such assignor so that the same cannot be proceeded in until the assignee is made a party." The Chancellor here speaks of voluntary assignments, the effect of which is to render the suit so defective that it cannot proceed in the name of the assignor, and unless the assignee is, within a reasonable time, made a party, the suit will abate. The suit does not necessarily abate by reason of the assignment; the adverse party may take some step in the proceedings after becoming acquainted with the fact which will amount to a legal waiver of his right to urge the objection. If the objection be taken at the proper time, the assignee may be made party by filing the proper bill. In support of this doctrine—*vide* Story's Eq. Pl., § 349, Mit. Ch. Pl., 64—copious reference might be made to Mitford and Story, showing that in case of assignment the suit does not necessarily abate, but may continue by making the assignee a party. We think, however, the above to be sufficiently conclusive on this point. The next question is, in what manner should the assignee be made party? If by the assignment the suit abates, it follows that the assignees, in order to avail themselves of any benefit obtained by the transfer must file a bill of revivor. But if the converse of this be true, as we have shown, and the suit does not abate, a bill of revivor is not only unnecessary, but improper, the object of the bill is merely to bring new parties before the court, and if, as we have shown, the suit is affected only by the alteration of interest which operates alone upon the parties, and not the subject matter of the suit, these new parties should stand in the same relation to the adverse party, as did the complainant before the transfer. *Deas* v. *Thomas*, 3 John., R. 551.

A bill filed by the assignee for this object, it is true, is in one respect, an original bill; original as being filed by new parties, but its nature is entirely supplemental, and is

therefore frequently called in the books, an original bill, in the nature of a supplemental bill.

Thus in the note to § 349, Story's Eq. Pl., it is said whether a suit in equity is abated by the bankruptcy of the plaintiff as well as defendant, has been a matter of doubt. But it seems now, to be thought, that the weight of authority is, that it is defective merely, and that the assignee may be brought forward by supplemental bill. See Cooper Eq. Pl. 76, 77; Metf. Eq. Pl. 65 and notes; and in the same note Lord Redesdale's language is: "If a commission of bankruptcy issue against any party to a suit, or he is discharged as an insolvent debtor, his interest in the subject is, unless he is a mere trustee, generally transferred to his assignees, and to bring them before the court a supplemental bill is necessary." Lord Redesdale, however, in the same note, holds to a doctrine that was relied upon in the argument; but it will be seen that he is speaking of the determination of the interest of the plaintiff or defendant, and the property becoming vested in another person who does not claim under him, as in the case of an ecclesiastical person succeeding to a benefice, or a remainder man in a settlement becoming entitled upon the death of a prior tenant, under the same settlement; in such case the suit cannot be continued by bill of revivor, nor its defects supplied by supplemental bill. This is not at all applicable to the case before us, as in this case, the assignees claim under the complainant, John Wright, and the illustration given by his lordship shows the application he intended to make of his proposition. We have thus far treated this case as though no re-conveyance had been made by any of the grantors. That re conveyance, we think, clothes the case in a new and different garb, and although there may be apparently some confusion in the books in relation to the proper bill, by which the assignees, when the interest remains alienated, shall be made parties, still when a part only of the interest is transferred, we think there can be no doubt as to

the proper course to bring in the assignees. By the agreement it appears that five out of the seven of the grantees re-conveyed to the complainant, for the purpose of enabling him to carry on the suit. This, we think, they had a right to do. We cannot see any impropriety in this; the effect was to restore the complainant to the same position, so far as they were concerned, which he occupied before the assignment.

The case, then, stands thus: At the time the objection was made the complainant owned five-sevenths, and the assignees, Ferguson and Mitchell D. Wright, two-sevenths; the complainant is, by his voluntary act, divested of a part of his interest. He is still a substantive complainant.

If the view we have taken in relation to the re-conveyance be correct, there is no doubt about the right of Ferguson and Mitchell D. Wright, to be made parties by the supplemental bill, even if there had not been a re-conveyance. We think from the authorities, it is quite as clear that they would have a right to file an original bill in the nature of a supplemental bill, by which they could secure to themselves all the advantages and benefits which had accrued to the complainant, anterior to the assignment.

Only one question remains to be noticed. It was contended in the argument, with much apparent confidence, by the counsel for the defendants in error, that the assignment of the complainant savored of champerty and maintenance, which are forbidden by law.

In this country there is but little or no necessity for enforcing the doctrine of champerty or maintenance. The causes which gave rise to the law do not here exist, and according to the ancient maxim, when the reason for the law ceases, the law itself ceases.

The English doctrine of maintenance arose from causes peculiar to the state of society in which it was established. The great reason for the suppression of champerty and maintenance, was the apprehension that justice itself was

endangered by their practices. Blackstone, 4 Com., 138, speaks of this offense as perverting the privileges of the law into an engine of oppression. In the case of *Sly-wright* v. *Paige*, 1 Leon, 167, it was said by the whole court of common pleas, that the meaning of the statute of the 33 H., 8, concerning maintenance, was to "repress the practices of many, who, when they thought they had title or right to any land, for the futherance of their pretended right, conveyed their interest, or some part thereof, to great persons, and with their countenance did oppress the possessors." The power of great men to whom rights of action were transferred, in order to obtain support and favor in suits brought to assert these rights, the confederacies which were thus formed, and the oppressions which followed from the influence of great men, in such cases, are themes of complaint in the early books of the English law. While the power of nobles and great men was felt in the administration of justice, these practices seem to have produced real and great evils.

In that state of things, instead of invigorating and purifying the administration of justice, as the direct remedy for such evils, the laws concerning champerty and maintenance were established as penal regulations, intended to operate upon the parties to these transactions.

It was a principle of the common law, that a right of action could not be transferred by him who had the right, to another. When we seek the reason of this rule, we find it in the motive already mentioned, an apprehension that justice would fail, and oppression would follow, if the right of action might be assigned. "Nothing," says Coke, Co. Lit., 114, "in action entry or re-entry can be granted over, for so under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." This doctrine, it will be seen, has grown out of the inequality of society in England. The rich, the great and noble, should not come in with their wealth and

influence, and maintain suits by which the weak and poor could be oppressed. In modern times the doctrine has, to a great extent, yielded, and the evils, under a pure and firm administration of justice, are little felt. Champerty and maintenance are now seldom mentioned as existing in fact, or as producing any considerable mischief.

In this country, with wise and wholesome laws, enjoying as we do a political and social equality, which never can exist under the institutions of England, with the administration of justice alike accessible to the poor and the rich, where oppression, such as give rise to the doctrine of maintenance and champerty in England, cannot exist, it is almost impossible to conceive how a case of champerty or maintenance can occur; it is a part of our judicial policy not to shut out suitors, or close the temple of justice against those who resort thither for an adjustment of their legal rights. Neither should litigation be incited, or improperly or unlawfully encouraged, so as to amount to oppression.

To check and prevent this, our statutes in relation to malicious prosecutions and limitations of actions, have been passed. We have no statute in this state against champerty and maintenance, as they have in New York and some other states of the Union; neither do we see any necessity for adopting the English law on this subject. The state of society which produced them, and the evils which they were intended to remedy do not exist here. To transfer the right of action, or to maintain the suit of another without having any direct or contingent interest in it, will not necessarily produce mischief or oppression in this country. It may, on the other hand, in particular cases, have a tendency to secure rights and promote the ends of justice.

But if this doctrine of maintenance prevailed here, still the maintenance of the suit of the complainant, Wright, by his sons would not be obnoxious to the law "when there is consanguinity or affinity between the suitor

and him who gives aid to the suit; the voice of nature and the language of the law equally declare that such assistance is not unlawful maintenance." *Thallhiner* v. *Brinkerhoff*, 3 Cow., 623. In this case the learned chancellor has given an elaborate and able opinion upon this subject, in which the doctrine is, we think, viewed in its proper light.

The points raised and argued in this case being somewhat new, and, at first sight, a little embarrassing, and the case being one of great importance, we have examined the question at greater length than we might otherwise have considered necessary.

The judgment of the district court, allowing the plea of Edward Kilbourne as a bar to the suit, and refusing to permit Ferguson Wright and Mitchell D. Wright to be made parties by supplemental bill, is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Dissenting Opinion by GREENE, J. I cannot fully concur in the opinion. The right of a complainant to transfer his equities in a bill, *pendente lite*, is too broadly and generally asserted. Ordinarily, when a party seeks to take advantage of fraud in a judgment rendered against his land, it is for him alone, as the injured party, to seek the remedy. If the party on whom the wrong or fraud is perpetrated, waives his remedy by silent acquiesence, it does not belong to a purchaser under him to revive the remedy — to prolong the controversy and litigation, unless the fraud was collusive for the purpose of injuring such purchaser; and hence the common law doctrine, that fraud can only be avoided by him who had a prior interest in the estate affected, and not by him who subsequent to the fraud acquired the interest. 3 Coke, 83, a; 5 John. C., 554; 7 Paige C., 18.

I cannot indorse the doctrine of the opinion in this case, that the right of action against a fraud is transferrable, as

some other actions in equity may be; but I hold that such a transfer might in good conscience be recognized in all cases where it is made, as in this case, by a father to his children, who were, as heirs, interested in the remedy, and might have been dependent upon the very estate for support at the time of the alleged fraud. Upon the intimate relation of parent and child — upon the ground of consanguinity and the right of inheritance, and upon that only, do I favor the conclusion that the plea in this case should not be considered a bar to the proceeding.

I cannot agree with the opinion: "that a plea in chancery should never be allowed as a bar if it depends for its basis upon facts which have transpired since the filing of the bill." If this be true, then a full conveyance of all interest and right of action from complainant to defendant could not be pleaded in defense of the action.

In all other particulars, I fully concur in the able opinion of my learned brother.

Decree reversed.

J. C. Hall and *C. H. Phelps*, for appellants.

Reeves and *Miller*, for appellees.

KNETZER *v.* BRADSTREET.

In a bill to foreclose a mortgage a statement of the substance of such instrument is all that is required; and if a question is raised in relation to the mortgage a certified copy is admissible in evidence where the original is not within the control of the party wishing to use the same.

Where a respondent was required by rule to plead answer or demur within thirty days, and within that time submitted a demurrer to the decision of the court, and having rested his case upon such decision without filing an affidavit of merits, the decree rendered before the expiration of said thirty days will not be disturbed.

APPEAL *from Des Moines District Court.*

Opinion by GREENE, J. Proceedings under the statute to foreclose a mortgage. The bill was filed in March, 1849. At the fall term following the plaintiff had leave to amend, and subsequently filed an amended bill in which it was set forth that a decree of foreclosure had been rendered upon the mortgage for the non-payment of the note which first became due, and that said Mary A. Knetzer had taken the cause to the supreme court where the papers including the original deed of mortgage were then pending and could not be procured; and he therefore submitted a certified copy of the mortgage from the recorder's office. The defendant was then ruled to plead answer or demur within thirty days, and before the expiration of that time, she filed a special demurrer that the reason assigned for not procuring the original deed was not sufficient and submitted the same to the court. Whereupon the demurrer was overruled, and it was decided that the alleged copy of the original mortgage on file as an exhibit, and as referred to in the bill, was sufficient oyer without producing the original mortgage. The court thereupon rendered a judgment for the debt and a decree of foreclosure, *pro confesso*. To these proceedings there are two objections urged.

1. It is contended that a foreclosure could not be properly

awarded without the original mortgage. But we have discovered no such imperative rule in chancery practice, or in our statute concerning mortgages. The substance of such an instrument is all that is usually required in a bill of complaint, and our statute in this particular provides for nothing more. It only requires all mortgagees to file a petition setting forth the substance of the mortgage deed. Rev. Stat. 443, § 4. This statute is more than complied with by the present bill. It not only gives the substance, but it purports to furnish a certified copy of the mortgage, and we think it sufficiently explains the inability of the complainant to produce the original, even if it had been required by the practice of the court. The statute declares that when it becomes necessary to use any such instrument and it is not within the power of the party wishing to use the same, the record thereof, or a transcript of such record, may be read in evidence. Rev. Stat. 209, § 35. In this case the party showed to the satisfaction of the court that the mortgage was not within his power, and therefore if any question had arisen in the case, in reference to the mortgage, a certified copy would have been admissible. We think then, that the court very properly admitted the copy, and correctly rendered the judgment and decree of foreclosure.

2. The only other objection urged is, that judgment was obtained before the expiration of the thirty days rule to plead, answer, or demur. As the defendant chose to file her demurrer and submit it to the decision of the court sooner than she was required, she cannot now take advantage of the proceeding. It was the result of her own action. She appears to have rested her case upon the demurrer, and intimates no desire or intention to file any plea or answer. Besides, the statute expressly declares that if a demurrer be overruled the defendant shall be allowed to answer over upon filing an affidavit of merits. Stat. of 1844, p. 50, § 3. Had the defendant in this case desired to answer over, it became incumbent on her to file an affidavit. As she

neglected to do that, it can only be inferred that she had no meritorious defense and chose to abide the decision upon the demurrer.

Judgment and decree affirmed.

D. Rorer, for appellant.

H. W. Starr, for appellee.

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SPROTT *v.* REID.

As a general rule, an execution must pursue and be warranted by the judgment; but a variance in date or description which might have been amended, is not sufficient to invalidate the sale in a collateral proceeding.

Where an execution sufficiently identifies the judgment to render certain the authority upon which it issued, it will invest the sheriff with power to sell.

Where the law provides that the costs of partition shall be paid in the first instance by the petitioners, but eventually by all the parties in interest, it is not necessary that the final judgment for cost against all the parties should show that they were first paid by the petitioners.

A judgment for costs, a necessary incident to a judgment in partition, and is not conditional where it awards execution against such of the parties as should fail to pay their respective portions within sixty days.

The death of defendant in execution at the date of sale cannot affect its validity.

A judgment for cost does not create the obligation of a contract within the U. S. constitution and the special session laws of Iowa of 1844; and where such judgment was rendered prior to the valuation law, and the execution issued under that law, and where the record shows affirmatively that the property was sold without valuation, the sale is void.

ERROR *to Lee District Court.*

Opinion by GREENE, J. Action commenced by H. T. Reid against James Sprott for eighty acres of land on the Half Breed tract in Lee county. Judgment for the plaintiff.

On the trial, the plaintiff gave in evidence the record of the judgment of partition, and a sheriff's deed, showing that the land in question had been sold to him in part satisfaction of the judgment for costs, in the partition suit.

The defendant then offered in evidence two executions, issued on said judgment for costs. The *alias* execution was dated June 20, 1844, and directed the sheriff to proceed without regard to the valuation law. This execution recited the judgment as rendered April 7, 1841, when, in fact, it was rendered at the October term of the court, in that year. He then offered to prove that the execution defendant died before the sale to plaintiff, and the court sustained plaintiff's objection to the introduction of such proof.

To show his own right to the land, the defendant offered a deed, under an administrator's sale by an order of court, dated January 8, 1845; which deed was recorded subsequently to that introduced by the plaintiff. But the defendant's deed was objected to. The court sustained the objection, and instructed the jury that the evidence introduced by the plaintiff showed the legal title to be in him.

As several errors are assigned, upon points which have already been fully adjudicated by this court, we will present those only which indicate new features for consideration:

1. It is claimed that the executions, introduced by the defendant, show that the plaintiff did not acquire legal title under the sheriff's deed. The variance between the date of the judgment and the date as recited in the execution, is urged as sufficient to invalidate the sale. It is true, as a general rule, that the execution must pursue and be warranted by the judgment. But the variance complained of in this instance is one that might have been amended. It is one of those irregularities which should be regarded as voidable only, and we consider it not enough to invalidate the sale in a collateral proceeding, like the present. The execution so

describes and identifies the judgment as to render certain the authority upon which it issued, and that was sufficient to invest the sheriff with power to sell. As the variance is the result of a mistake in the clerk, which might have been amended, and as the execution otherwise identifies the judgment, it cannot, under the prevailing current of authorities, be regarded as fatal to plaintiff's title. *Humphreys* v. *Beeson*, 1 G. Greene, 199; 4 Wend., 585; 8 ib., 676; 5 Cowen, 529; 4 Blackf., 263; 4 How. Miss., 267.

If an execution varies or departs so materially from the judgment upon which it issued, as to render the identity or connection uncertain or doubtful, there would be obvious propriety in regarding a sale under that execution void. In the case at bar, there is no such material variance, and hence the sale is not void on that account.

2. It is objected that the judgment for costs, under which the property was sold, was not such a valid operative judgment as would authorize the execution and sale, but as it is conceded that the jurisdiction of the court was competent to render the judgment of partition, it must be conceded that the powers of the court were equally competent to render the judgment for costs. The latter became a necessary incident to the former, and was expressly authorized by the partition law.

It is urged as an objection to this judgment for cost, that the law, and judgment itself required payment of costs in the first instance by complainant, and that the judgment does not show such payment. The law provides that "all the costs of partition shall be paid in the first instance by the petitioners, but eventually by all the parties, in proportion to their interests." Rev. Stat., 462, § 32. It was not necessary for the judgment to show that the petitioners first paid the costs. It is enough for us to know that the judgment was against those who were eventually to pay the cost in proportion to their respective interests.

As the judgment was authorized by law, it must be pre-

sumed that all necessary facts, preliminary to the judgment, were established to the satisfaction of the court.

But if true that the petitioners did not in the first instance pay the cost, that fact would not exempt the parties from eventual payment, nor divest the court of power to render judgment against them, nor exempt their property from its effects.

Again, it is urged that the judgment was interlocutory and conditional, and authorities are cited showing that such judgments are objectionable. We can see no analogy between those authorities and the judgment under consideration. This was the final judgment in confirmation of the partition. It was rendered by a court of competent authority, and awarded an execution against such of the parties as should fail to pay the costs within sixty days. The judgment, then, was not interlocutory or conditional. It was final and absolute. It unconditionally required payment of cost, and unconditionally awarded an execution against those who did not pay their respective portions within sixty days — thus virtually granting a stay of execution for that time. It will hardly be contended that a mere stay of execution makes a payment conditional. We conclude, then, that there was a valid and subsisting judgment.

3. Did the court err in rejecting the proof that the defendant in execution died before the sale? We think not. The judgment for cost was made a special lien upon the property divided. It was a judgment *in rem*, and the land in question was subject to the payment of the lien, whether the defendant was dead or alive. Besides, under the laws of this state, land is subject to the payment of debts before it can descend to the heirs at law.

But in any view of the law, the fact which the defendant below proposed to prove, could not invalidate the sale. He did not propose to show that the defendant was dead at the issuing and attestation of the writ. The proof applied

merely to the date of sale, and of course could have no application to the time when the execution issued, nor to the authority exercised by the sheriff under the writ. 7 Blackf., 156; 4 Howard, 80; 4 Washington, C. C., 6.

We conclude, then, that the court was justified in rejecting the proof, because it could not affect the validity of the sale.

4. As the valuation law was in force at the date of the execution, and as under that law the sheriff was only authorized to sell property at two-thirds its appraised value, it is claimed that the sale, having been made without regard to that law, was unauthorized and void.

The record shows affirmatively that the property was not sold under the valuation law; and the question arises was the judgment under which the sale was made, in any way removed from the provisions of that law? If not, the sheriff had no authority to sell the land for less than two-thirds its appraised value; and as the record shows that he sold it at a mere nominal price without regard to value or valuation, the deed must be regarded as absolutely void. The only question to be decided in order to determine the application of the valuation law to the execution is, was the judgment obtained on a contract made prior to the 20th of February, 1843. Laws of special session 1844, p 7. This law was passed in order to make the valuation law conform to the constitution of the United States, by not "impairing the obligation of contracts."

If the judgment for cost was a contract such as the constitution contemplates, a sale according to valuation was not necessary.

According to 1 Bouvier's Law Dictionary, 353, § 9, "a judgment is an express contract of the highest obligation." See also, Story on Con., 1, 2; 7 John., 488.

The authorities are conflicting. Lord Mansfield says that "a judgment is not a contract." In 14 John., 479, the court say that a judgment is not a contract in fact.

But it matters not how courts may have viewed the analogy between judgments and contracts. It is obvious that a judgment is not in fact a contract; it is not an agreement or covenant between two or more persons; it is not a mutual promise upon lawful consideration, creating mutual obligations, either executed or executory; it is not an agreement between two or more, to do or not to do a particular thing. A judgment may be the result of a contract, but is not the contract itself.

A judgment or decree by consent, comes nearer to a contract than any other, but even such is only the result of an antecedent contract, liability, or penalty. Where a contract is enforced by judgment, it enters into and becomes a part of the judgment, but still, that judgment is not the obligation of the contract, but is the authorized power under which those antecedent obligations are to be enforced.

True, the relation between a contract and its consequent judgment is very intimate, and still judgments are often rendered where no contract existed. Judgments are rendered for crimes, misdemeanors and torts, and on mere *exparte* liability. It can hardly be claimed that such judgments should be regarded as contracts, and yet those judgments have as much force and validity, as those growing out of contracts.

A judgment is the decision of the court in a civil or criminal proceeding; it is the determination or sentence of the law; but a contract is a compact between two or more persons, and hence a judgment is not a contract at law. It is conceded that they are not the same in fact, but claimed that they are so in contemplation of law. But we find no legal definition applicable to the one that can designate the other. As the same legal definition can in no instance be applied to both terms, they can in no instance become convertible. They are regarded as essentially different in business transactions, in legislation, and in all adjudications. In all statutes affecting them

they are treated as entirely distinct and different. The one is the result of *private* action; the other the result of the law as determined by an authorized tribunal. The one is produced by the parties in interest; the other is the determination of a disinterested person. The one has to be proved; the other proves itself.

But some judgments are more nearly assimilated to contracts than others. Where a judgment is rendered to enforce the obligation of a contract, it approximates, but still it is not the same; it does not create this obligation; it only creates the authority under which that obligation is enforced.

In a large portion of judgments there is no such analogy; no approximation.

If a judgment is not the result of a voluntary contract, it cannot have the same analogy as that which is ordered to enforce a contract; and hence, the judgment in question can have no such analogy. This judgment was not rendered upon a contract. It was only for costs and charges growing out of a proceeding *in rem*, a proceeding resulting from no personal obligation or contract expressed or implied. The partition proceeded from the accidental relation of the parties from their joint and common interest in the land, and was the consequence of the law upon that relation. The costs were an incident of the partition, and the judgment for costs the result of that incident, and hence it has no affinity to the obligation of a contract.

True, this judgment creates an obligation, but not such an obligation as comes within the letter or spirit of the constitution. It is an obligation imposed by law, and not the obligation of a contract made by the parties.

If a judgment is a contract within the protecting clause of the constitution, as claimed, then it must follow that if rendered under the valuation law, it would be subject to its provisions although rendered upon the obligations of a contract made prior to that law. It would be no less a

contract if rendered subsequent to the passage of the valuation law, and as the old obligations would enter into, and be superseded by the new judgment contract, it follows that this view of the judgment would impair those old obligations, and thus violate the constitution.

We can find no decision that will justify the position urged by defendant in error. There have been many decisions in the supreme court of the United States bearing directly upon this clause in the constitution, but none of them go so far as to make it applicable to any other obligation than that of a contract voluntarily made between parties.

Bronson v. *Kinzie*, 1 How., 316, originated in a mortgage contract, and the case turns upon the principle that the rules of law and equity in relation to mortgages, entered into and formed a part of the contract. It refers particularly to the laws in force "when the contract was made," and has no application to those in force when the decree was rendered.

The same principle prevails in *McCrackin* v. *Haywood*, 2 How., 608.

In 10 Howard 398, it was held that "it must certainly be shown that there was a perfect investment of property in the plaintiff in error by contract with the legislature, and a subsequent arbitrary divesture of that property by the latter body, in order to constitute these proceedings "an act impairing the obligation of contract." If we adhere to that rule and apply the analogy to transactions made by individuals, we must arrive at the conclusion, that unless obligations are created by contract within the legal acceptation of that term, they are not protected under the constitution; and as a judgment creates no such obligation, it cannot come within the rule.

But it is contended that if a judgment is not a contract, the sale under the execution would still be valid, even if

there was no valuation as required by statute; and authorities are cited in support of this position. We readily concede that if the record in this case was silent in relation to the valuation and sale at the price provided by law, that it might well be presumed the officer had done his duty and had made a valid sale. But the record in this case expressly shows the contrary. It shows that there was no valuation, and that the sale was not according to appraisement. The statute inhibits the sheriff from selling property at less than two-thirds its appraised value. That is made an express condition upon which depended the power of the sheriff to sell. This valuation clause was enacted to protect execution debtors from a ruinous sacrifice of property. It would be subversive of that intention and an outrage upon the rights of such defendants, to decide that it was not necessary to sell the property agreeable to the valuation required by law.

That this matter of valuation under such a law is not merely directory, but a question of power on which depended the validity of the sale, is abundantly shown by the authorities. 3 How., 713; 6 ib., 21; 7 ib., 178; 2 Mass., 154; 14 ib., 28; 3 New Hamp., 46; 2 Black., 1; 1 Gil., 307.

As the record in this case shows that the property in question was sold at a mere nominal price without regard to valuation, and as the judgment was not rendered upon the obligation of a contract, we conclude that the court erred in deciding the legal title to be in the plaintiff below.

Judgment reversed.

Geo. C. Dixon, for plaintiff in error.

H. T. Reid, pro se.

SMITH *v.* WALSH.

A deed executed in another State is good under the statutes of 1840 and 1841; whether acknowledged according to the laws of that state, or according to the statute of 1840.

Proof of the execution of a deed which has been duly acknowledged is not necessary, unless denied under oath.

ERROR *to Lee District Court.*

Opinion by GREENE, J. Action of right. Plaintiffs claim under the judgment of partition of the Half Breed lands in Lee county and recovered a verdict and judgment in the court below.

It is now objected that the court erred in admitting a deed in support of plaintiff's title without proof that it was acknowledged according to the law of the state in which it was executed. But as the deed appears to have been acknowledged according to the statute of 1840, any further proof of its execution was not necessary. If the deed had not been acknowledged according to the statute of 1840, then, it was admissible under the statute of 1841, if acknowledged according to the law of the state wherein it was executed. Hence a deed acknowledged according to the laws of Iowa, or according to the laws of the state in which it was executed, would be equally good. Nor would further proof of its execution be necessary unless denied under oath. Laws of 1841, p. 40, § 3. We conclude then, that the court below did not err in admitting the deed without proof of its execution.

Judgment affirmed.

J. C. Hall and *C. H. Phelps*, for plaintiff in error.

J. Matthews, for defendant.

JOHNSON *v.* CARSON.

A purchase at sheriff's sale will be protected, if the sale was authorized by a judgment execution and levy, and if the purchaser paid the price stipulated under appraisement. The fact that the appraisement was not made upon actual view of the premises as directed by statute, will not invalidate the sale.

A *bona fide* purchaser at a sheriff's sale under the judgment in partition of the Half Breed lands, cannot be deprived of his title by proof, *dehors* the record, that the execution defendants were minors without guardians, when the judgment was rendered against the property.

ERROR *to Lee District Court.*

Opinion by GREENE, J. This was an action of ejectment commenced by L. E. Johnson against A. Stebbins for the possession of a lot in Keokuk, Lee county. On motion of plaintiff, H. Carson was substituted as defendant. Plea, general issue. Trial by jury. Verdict and judgment for plaintiff.

On the trial, plaintiff gave in evidence the judgment of partition of the Half Breed lands in Lee county, and also an execution and sheriff's deed, showing title in him to the land in question.

The defendant then offered to prove that the appraisement was made without the appraisers having seen the land, and without leaving their room, and also offered to prove that the defendants in execution were minors when the judgment was rendered against them. But the court sustained the objection made to defendant's evidence, and therefore they bring the case to this court.

1. Would the evidence offered in relation to the appraisement invalidate the sale? The valuation law directs the appraisement "upon actual view of the premises forthwith after such view." Rev. Stat., 630, § 3. It is claimed that this *actual view* was essential to the validity of the sale. This would be true if such actual view could be considered an element of power, or one of those essential

objects to which the law directs the execution purchaser, as authority upon which he might rest his title. The purchaser is only required to look at the judgment, the execution and the levy for evidence of the sheriff's power to sell. If these are in conformity to law, *prima facie*, he is justified in paying the price required by law for the property, and should be protected in his title. If the law, as in this case, requires him to pay at least two-thirds of the valuation, he is only to ascertain the amount of the valuation as returned, and need not go into an examination of the position or conduct of the appraisers.

As decided by this court in *Sprott* v. *Reid** an appraisement of the property executed under the valuation law of Iowa, is an indispensable pre-requisite to the sheriff's power to sell, made so from the fact, that such sale cannot be for less than two-thirds of the appraised value. But the method to be pursued in making that appraisement is not so essential. In that particular the statute is only directory, and hence any mere irregularity or departure in those directory proceedings would not be nullities, and could not vitiate the sale in a collateral proceeding. The execution returns, and the deed in this case, show authority in the officer to sell the land, and as matter of record they show that the requirements of the law were observed, and by statute the deed is made "*prima facie* evidence of the regularity of the officer's proceeding." Rev. Stat., 630, § 3.

The record in the case shows conclusively that there was a valid judgment, execution, levy and sale, under appraisement. These were all the purchaser needed at law to justify and confirm his title; consequently proof of irregularity in those objects themselves, would not be competent to impair or invalidate his title. *Humphreys* v. *Beeson*, 1 G. Greene, 199; *Hopping* v. *Burnam*, 2 ib., 39; *Corriell* v. *Doolittle*, ib., 385; *Voorhes* v. *U. S. Bank*, 10 Peters, 449.†

**Ante* p. 489. †*Sprott* v. *Reid*—*ante* pp. 489–191.

2. Did the court err in excluding the proof offered to show that the defendants in execution were minors without guardians, when the judgment for costs was rendered? It has been repeatedly decided, by this court, that the judgment in partition of the Half Breed lands, is final and conclusive of all rights therein adjudicated; and consequently in a collateral proceeding, like the present, evidence that some of the parties in interest were minors, is not admissible. All parties interested in that tract of land, minors as well as adults, had legal and ample notice of the partition proceedings; all were invited to appear and establish their interest; all had their day in court; and the judgment is made conclusive that the rights of all were fully adjudicated; and they cannot now, by extrinsic proof, *dehors* the record, avoid the effects of that judgment. *Wright* v. *Marsh*, 2 G. Greene, 94. If the parties themselves could not avoid the conclusiveness of the judgment, how then can parties, not connected with the record, expect to do so?

When, as in this case, a judicial sale appears to have been regularly conducted, by virtue of a judgment rendered final and conclusive, the rights of a *bona fide* purchaser cannot be affected by any evidence of error or irregularity in the judgment. This could not be done by a party directly affected by such error or irregularity, and *a fortiori* it cannot be done by one who is no way a party to the record. *Armstrong* v. *Jackson*, 1 Black., 210; *Thompson* v. *Tohnie*, 2 Pet., 157; *Ashley* v. *Abney*, 1 Hill, S. C., 380; *Giles* v. *Pratt*, ib., 239; 2 Howard, U. S., 319.

It is conceded, by counsel for plaintiff in error, that if the execution defendants were minors the judgment of partition would only be erroneous, and as the error was not taken to the supreme court for correction within the time limited by law, that judgment is now final and conclusive. But it is claimed that the judgment for costs against minors is absolutely void. Clearly, if the principal judgment is

only erroneous, its legitimate and necessary incident, the judgment for costs, cannot be more so. The latter is the necessary result of the former. It was not a judgment against the minors; it was only a judgment in *rem*, a lien, a tax upon the land, and is as conclusive, as irrevocable as the judgment in partition.

We conclude that the court was fully warranted in excluding the extrinsic proof offered by the defendants below.

Judgment affirmed.

R. P. Lowe, for plaintiff in error.

J. C. Hall, for defendant.

3g 502
82 177

3g 502
136 174

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140 713

SIMONS *et al. v.* MARSHALL.

The complaint in an action of unlawful detainer, is good, if it avers in substance all the facts required by statute.

Parole evidence admissible to show that a party known as G. W. T., signed a lease in the name of E. H. T., and was in possession by virtue of that lease.

Where the payment of rent monthly in advance was stipulated as a condition of the lease, a failure to so pay the rent is a forfeiture of the lease.

A tenant cannot deny his landlord's title; nor justify an unlawful detainer by showing fraud in the lease.

ERROR *to Lee District Court.*

Opinion by GREENE, J. This was an action of unlawful detainer by S. T. Marshall against A. H. Simons and G. W. Turner to recover possession of a house and lot in Keokuk. The complaint was filed before a justice of the peace

in the usual form. The venue was twice changed, and the cause finally submitted to a jury, who returned a verdict in favor of the plaintiff, and judgment was rendered accordingly.

The defendant took an appeal to the district court where judgment was again rendered against the defendants. On the trial many exceptions were taken to the instructions and rulings of the court which are now urged as error.

1. A number of the errors assigned are in relation to the form of the complaint, but as it seems to be in substantial conformity to the statute, and contains all the material averments required, we think the objections urged are not well founded and were very properly overruled by the court. It was decided by this court in *Shaw* v. *Jordan*, 2 G. Greene, 376, that such a complaint is good where it contains all the averments of facts required by statute.

2. It is objected that there was error in admitting the lease which was signed "A. H. Simons and E. H. Turner," in evidence against G. W. Turner, and in admitting parole evidence to show that said G. W. Turner was the person who signed the lease as E. H. Turner. In support of this objection the principle is advanced that it is not competent to alter or vary an instrument under seal by parole evidence. But how was that instrument varied or changed by the proof offered? There was no change made to any term, condition or obligation in the lease. The proof only identifies one of the parties who signed the lease as being one of the parties in wrongful possession. The fact that he did not sign his true name would not release him from the obligation created by the fact that he did sign as lessee, and went into possession under the lease. He could not justify a wrongful holding over by his own misnomer. A party cannot thus take advantage of his own wrong.

3. It is objected that the time for which the premises were let had not expired. The lease stipulated that the tenants "deliver the said house up to said S. T. Marshall at any

time on demand, in case the rent is not paid in advance waiving all process at law." The bill of exceptions shows that the tenants had failed to pay the rent, and that they had forfeited all rights under the lease. The principal condition upon which they were to retain possession was the payment of rent monthly in advance. A failure to so pay the rent forfeited their right of possession.

4. All the other errors assigned are involved in the question—Can a tenant deny his landlord's title? As a general rule it is conceded that a landlord's title cannot be disputed by his tenant but it is urged that this case is an exception to that rule. And why an exception? Because, it is said, there was fraud exercised in obtaining the written lease; that the landlord pretended to have legal title when in fact he had no such title. This amounts to nothing more than an attempt to dispute his title without attempting to show that the title which they acknowledged had terminated either by conveyance or operation of law, and was vested in them.

The fact that the court did not permit that defendant below to show fraud in the lease was not erroneous, even if the matter of fraud did not involve the question of title. Fraud in the lease will not justify an unlawful detainer. They first attempt to justify their possession under the lease on the ground that the term had not expired, and then claim that the same lease was fraudulent. If fraudulent and void they, of course, could claim no rights under it, nor would that fact warrant them in holding over. One wrong cannot be thus warranted by another. We conclude then that fraud in the execution of a lease cannot be set up by the tenants in justification of an unlawful detainer of the premises.

Judgment affirmed.

L. E. H. Houghton, for plaintiff in error.

J. C. Hall, for defendant.

STEWART *v.* CRAIG *et al.*

Where a special contract for work stipulated that payment could be made half in cash and half in goods, and when payment was refused by defendant after he accepted the work, held that plaintiffs might sue as on a money contract.

Plaintiffs may recover on *indebitatis*, and common counts in assumpsit for for work and labor performed under a special contract, when the stipulations of the contract were so materially departed from under defendant's directions, that it could not be sued on specially.

ERROR *to Lee District Court.*

Opinion by GREENE, J. This was an action of assumpsit for work done under a special contract. Plea general issue and set-off. Verdict and judgment in favor of the plaintiffs below.

On the trial the defendant below requested the court to instruct the jury that unless they find from the evidence that the written contract has been abandoned, the plaintiff cannot recover in this action any thing more than for the extra work they may have performed for the defendant. It is objected that the court erred in refusing this instruction and in directing the jury that if they were satisfied that the plaintiffs had executed the contract, and if the evidence was otherwise sufficient, they could recover under this form of action.

It appears that the work under the direction of the defendant below, was not performed within the time and stipulations of the contract; still it was accepted by the defendant. The declaration is not upon the contract specially; it is in *indebitatis assumpsit*, with several common counts, and it is objected that plaintiffs could not recover on the contract under such a declaration, because under the contract the work was to be paid for, partly in money and partly in property. Greenl. Ev., §§ 78, 103, and 104.

But from the record, it must be presumed that the defendant refused payment of the property as well as the money, and therefore the plaintiffs were entitled to recover the entire amount in money. It became a cash demand by the refusal and neglect of defendant to furnish the property, and could be sued and declared on accordingly. *Wiley* v. *Shoemak*, 2 G. Greene, 205. In *Payne* v. *Couch*, 1 G. Greene, 64, it was held that a note payable in property is admissible in evidence under the common or money counts; Morris, 187; 4 Wend., 285, 575; 2 McLean, 218; 7 Wend., 311; 4 Con., 560.

There is nothing in the record of this case that would seem to render the instruction necessary or applicable to the evidence and pleadings. Nothing to show that the validity of work performed under the written contract could not be recovered under the common counts, nothing to show that the court was not justified in regarding the balance due as a money demand, and consequently is no error disclosed by the refusal to give the instruction asked, and by giving the instruction as modified.

Had the work been performed according to the stipulations of the contract, it should have been declared on specially, but as there was a material departure from that contract by defendant's direction, the plaintiffs were prevented from performing according to its stipulations, and as they consequently had no direct remedy on the contract itself they might sue in *indebitatis assumpsit*, and introduce the contract as evidence to regulate the amount to be paid, so far as it could be made applicable to the work performed. 4 Con., 560.

Judgment affirmed.

Reeves and *Miller*, for plaintiff in error.

J. C. Hall and *C. H. Phelps*, for defendant.

WRIGHT *et al. v.* COCHRAN.

Where the descriptive words in a deed are free from ambiguity, and clearly designate the land granted, and are followed by an alternative and disjunctive clause designating no particular land, such alternative clause may be regarded as surplusage, and will not impair the deed.

ERROR *to Lee District Court.*

Opinion by GREENE, J. This was an action of right, commenced by W. J. Cochran against C. H. Wright and others, for ten acres of land in Lee county. Plea, general issue. Verdict and judgment for plaintiff.

On the trial, the plaintiff established his title under the judgment in partition of the Half Breed lands, and introduced a deed from a party to that judgment. The only question raised in this court, is in relation to the description of the land, as contained in the deed. The land is very clearly designated in terms established for the description of lands by U. S. government survey, and after such designation, the description continues as follows: "On an amount of land, equal in quantity or value as above described in the interest of M. Gonville, in the Half Breed tract, in said county and state." It is objected that this description is in the alternative; that the deed is therefore void, and should not have been admitted in evidence. We regard the alternative, or concluding clause of the description, as vague and uncertain. But how can that circumstance impair the validity of the antecedent description which is clear and positive? That description is complete in itself, is free from ambiguity, and should not be effected by the disjunctive and vague surplusage which follows.

That which is indefinite or vague in a deed, should always yield to that which appears certain. 4 Cruise Dig., 200, § 7; 6 Cow., 231; 7 John., 217. So where there are

two clauses in a deed, in which the latter is repugnant to the former, the former shall prevail. 4 Cruise Dig., 300, § 8.

Where a deed may inure in different ways, the person to whom it is made shall have his election. 3 John., 375; 4 Cruise Dig., 313, § 49.

Besides, the rule prevails universally that courts, in construing a deed, will not effectuate the intentions of the parties, and will exclude words repugnant to that prevailing intention. 4 Cruise Dig., 295, § 2; 10 Mass., 183; 2 Hill. Abt., 392, § 1; ib., 325, § 15; 16 Pick., 435; 11 Conn., 332; 7 Verm., 100; 2 Hor. J., 112; 2 New Hamp., 536; 3 Pick., 272; 19 John., 449.

From these, and other authorities, to which we have referred, the propriety of rejecting the concluding alternative description in the present deed, and of giving full force to that description which is definite and clear, cannot be questioned. We conclude, then, that the court did not err in admitting the deed in evidence in support of the plantiff's title.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

Geo. C. Dixon, for defendant.

Hypfner v. Walsh *et al.*

The judgment of partition of the Half Breed lands in Lee county, final and conclusive of all rights therein adjudicated.

Where the land in controversy is shown by the pleadings to be within the venue of the court, proof of its locality is not necessary.

The locality of land designated within a given section, township, and range, as established by government survey, is matter of public record within the judicial knowledge of courts.

An instruction on an abstract principle of law and not applicable to any question of fact before the jury should be refused.

Error *to Lee District Court.*

Opinion by Greene, J. An action of right commenced by M. F. and M. J. Walsh against C. Hypfner, for a tract of land in Lee county. In pleading the defendant admitted that he was in possession, but denied the plaintiff's right to the property described. Trial by jury. Verdict and judgment for plaintiffs. The bill of exceptions shows that the plaintiffs derive title through their father from the judgment of partition of the Half Breed lands. Several instructions were asked affecting the conclusiveness of the judgment of partition, but as that judgment has been so often before this court, and so uniformly pronounced final and conclusive of all rights adjudicated, the court below very properly refused all instructions calculated to impair titles determined by that judgment.

But the court was requested to instruct the jury that unless they "find from the evidence that the land in controversy is in the county of Lee, in the State of Iowa, they will find *for* the defendant." The court refused to give the

instruction, and this refusal is urged as error. Under the pleadings as they appear of record it is a little singular that such instruction should have been asked, and still more that it should now be urged as law applicable to the case before the jury. The authorities cited showing that the jurisdiction of the court depended upon the *status* or locality of the property would be very good if applicable; if there could be any question raised under the pleadings in relation to the locality of the property. That fact is expressly admitted by defendant's plea. Under that plea the only question at issue was the plaintiffs' right to the property. And as those plaintiffs were proved to be the only heirs at law of their deceased father, J. W. Walsh, and as the muniments of title before the court established the legal title in said J. W. Walsh, it follows that all the evidence was before the court that was necessary to enable the plaintiffs to recover.

Besides, the land was described in the declaration as being within the venue of the court, and designated in the manner provided by the United States surveys of public lands. Where land is described as being within a given section, township, and range, as established by government survey, such description is matter of public record. It comes within the judicial knowledge of the court, and is not a mere question of fact to be determined by the jury. *Wright* v. *Phillips*, 2 G. Greene, 191.

It is objected that the court erred in refusing to instruct the jury as requested in relation to the descent and bequest of property by will, but under the circumstances we think the court ruled correctly. Not because the instructions refused are not correct as abstract principles of law; but because they were not applicable to the case before the court. There was no evidence or question before the court or, jury in relation to a will; any instruction therefore upon that subject would have been irrelevant and calculated to mislead the jury. An instruction upon a mere abstract

principle of law, however correctly stated, should be refused unless applicable to some question of fact before the jury.

Judgment affirmed.

Geo. C. Dixon, for plaintiff in error.

J. Matthews, for defendant.

Hine *et al. v.* Sweney *et al.*

Under the Code issues of fact may be tried by the court unless one of the parties requires a jury.

The defendant is entitled to a jury under the Code even if he refuse to advance the jury fee. The plaintiff should provide the fee or ample security.

Appeal *from Lee District Court.*

Opinion by Greene, J. An action of assumpsit by *Sweney & Gregg* v. *D.* and *A. Hine.* Trial by the court, and judgment for the plaintiffs.

Defendants now claim that the court below erred in refusing them a trial by jury. It appears that they demanded a jury, but the court decided that the jury fee fixed by law should first be paid by defendants. They refused to pay, and the court then directed the clerk not to call a jury.

The Code, § 1772, provides, that "issues of fact shall be tried by the court, unless one of the parties shall require a jury. When a jury is thus required, a fee of three dollars shall be assessed against the party having to pay the costs of trial."

This section only confers jurisdiction on the court to try issues of fact, when neither of the parties demands a jury. But in the present case one of the parties did demand a

jury, and therefore the court had no authority to assume the province of a jury and try the issue of fact. The simple fact that defendants refused to pay jury fees would not confer the jurisdiction.

But it is contended that a party is not entitled to a jury unless he pays the jury fee in advance. It is true, under the Code, § 2528, that "the jury fee required by law, must be paid in advance, unless ample security is given," &c. As suits are usually instituted for the use and benefit of plaintiffs, the practice generally obtains that they shall pay, or secure the payment of fees in the first instance, and if they recover judgment, they are entitled to recover their costs from defendant.

There is nothing in the Code which requires *defendants* to pay the jury fee in advance, although it might be ultimately assessed against them; hence we conclude that they were entitled to a jury trial without advance payment, and if plaintiffs had refused to advance the fee or furnish the requisite security, the court might have refused to advance further with their suit. If tried, defendants were entitled to a jury.

Judgment reversed.

J. C. Hall & C. H. Phelps and *D. Rorer*, for appellants.

J. W. Rankin and *J. M. Love*, for appellee.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

OTTUMWA, NOVEMBER TERM, 1852.

In the sixth year of the State.

PRESENT:*

HON. JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

3g 513
d89 412

Norris' House *v.* The State.

Where an indictment is found against a house as a "dram shop," the owner occupies the same position and is entitled to the same benefits and protection from the constitution and laws as if the indictment was against himself.

A grand jury should be composed of not less than fifteen persons, under the Code. An indictment found by a jury of less than fifteen, though approved by twelve jurors, is not good.

A party cannot be legally brought to trial on an indictment found by a grand jury not authorized by law, and he may take advantage of such indictment on motion.

Where a house is indicted it should be so described as to leave no reasonable doubt of its locality.

* Chief Justice Williams was detained at home by sickness.

APPEAL *from Davis District Court.*

Opinion by KINNEY, J. Indictment of a house as a "dram shop." Answer, that the bill of indictment was not found, by a legal grand jury of the county of Davis; that the court, on the first day of the March term, duly empanneled a grand jury of fifteen persons, and that the next day thereafter, one Gideon Lofftis, one of said fifteen persons, was, by said court, discharged from further attention upon said grand jury, and did not thereafter act with said grand jury, as appears of record; and that the other fourteen persons found and returned the bill of indictment.

A replication was filed, admitting all the statements contained in the answer, stating that the said juror was discharged in consequence of becoming intoxicated, and that the remaining fourteen found and presented the indictment. To this a demurrer was filed that the said fourteen persons could not act as a grand jury, after the discharge aforesaid.

A motion was made to set aside the indictment for the causes set forth in the answer; whereupon the court overruled the demurrer to the replication, and also the motion to set aside the indictment. This ruling of the court is assigned for error. This we will first consider before we proceed to an examination of the questions presented by the exceptions to the instructions given to the jury. And first was the bill of indictment in the case found and presented by a legal grand jury; and could the objection be raised at the time, and in the manner resorted to by counsel? No advantage is claimed in the argument, because the indictment is against a house; and it is conceded that the owner of the house occupies the same position that he would if the indictment had been against him, and that as such owner is entitled to all the benefits which the constitution

and laws confer upon an individual on trial for a criminal charge, and that the same strictness is required, and the same rules applicable, as though the indictment was against an individual instead of a house. The preceding was instituted under a provision of the Code, declaring "dramshops public nuisances, and authorising them to be indicted." The indictment is virtually against the owner, and for the sake of convenience we shall so treat it in this opinion; in this respect following the court below, and the gentlemen on either side who have argued the case to the court.

The first article of the constitution, § 11., provides that: "No person shall be held to answer for a criminal offense unless on presentment or indictment by a grand jury," &c. The number necessary to constitute a grand jury is not prescribed by the constitution. It was left for the legislature to define how many persons should be sufficient to compose this body, and to provide for its selection and organization. Accordingly, they have provided in § 1642 of the Code, that "when grand jurors are to be selected, their number must be fifteen, and they shall serve for one entire year thereafter."

If the requisite number of jurors do not appear by the time appointed, the court may at any time direct the sheriff to summon forthwith the number necessary to make up the deficiency. § 1647.

The number of jurors must be as fixed above. § 1648. And it is provided in § 2881, that "on the first day of the term of the court for which a grand jury has been summoned, they must be called, and if fifteen do not appear, or if the number appearing be reduced to less than fifteen, the court may order the sheriff of the county to summon a sufficient number of qualified persons to complete the panel. It is clear from the above sections of the code, that a grand jury must be composed of fifteen persons, and that a less number is not permitted. The legislature have carefully provided for all possible contingencies so as to prevent a

reduction from the number required, and to preserve without any encroachment, the number fifteen as fixed by law. This number and this alone unimpaired is absolutely necessary to constitute a grand jury, and hence if this number is in the least diminished, there is no legal grand jury in contemplation of law. If a less number than fifteen is sufficient to form the body, then indeed could the number be reduced, so that even the appearance of a grand jury could not remain. But it is said in reply to this that it is only necessary for twelve to concur in finding a bill, and hence after the grand jury is organized, the court has a right to reduce the number down to twelve. This position is unsound, and at variance with both the letter and spirit of the law. It is only required that twelve concur in finding a bill, but the other three cannot in any manner be dispensed with. They are as essential in order to maintain the organization and action of the grand jury, as though the law required the entire number to agree in finding an indictment.

But we are referred to § 2891, in justification of the action of the court in discharging the juror in this case. By this section, the court is permitted to appoint a foreman when the foreman already appointed is discharged or excused before the grand jury is dismissed. This we believe to have reference to the discharge or excuse of the foreman as foreman, and not to his discharge from the grand jury. If after he is appointed, and before he takes the oath, he wishes to be excused, the court may excuse him, or if after the oath of foreman is administered, he should prove to be incompetent, or for any other cause it should become necessary or thought best to discharge him from acting in that capacity, the court may appoint another to act in his place, retaining him however upon the jury.

But if we have taken an improper view of the meaning of this section, it does not follow as a necessary result that

by the discharge from the jury of the foreman, that the jury thereafter is only to be composed of fourteen. On the contrary, it would be the duty of the court to fill the panel, so that the number required by the Code should be preserved. Under all circumstances, the grand jury *must* be composed of fifteen persons, as nothing less than this will satisfy the requirements of the law. The indictment in this case having been found and presented by a less number, was it a legal indictment, and was the defendant bound to defend against it?

"An indictment is an averment in writing made by a grand jury legally convoked and sworn, that a person therein named or described has done some act, or been guilty of some omission which by law is a public offense." § 2915, Code. The grand jury was legally convoked and legally sworn for aught that appears, but the bill of indictment was not found and presented by the jury that was so convoked and sworn. By taking from the body one of its members, the entire panel was disturbed, the organization changed, and hence the findings and presentments afterwards cannot be said to have been by a grand jury legally convoked and sworn. Such findings did not result from the deliberations of the grand jury which had been convoked and sworn, and therefore any indictment found and presented by the body changed by a discharge of any of its members would not be found and returned by a legal grand jury. But it is said that although the bill was found by an illegal grand jury, that the defendant could not after they had been sworn, interpose any objection, and in support of this position we are refered to § 2890, which reads as follows:

"When several persons are held to answer for one and the same offense, no challenge to the panel can be made unless they all join in such challenge; nor can any objection be interposed by a defendant to the grand jury, or to an individual juror, for any cause of challenge after they are sworn."

The language of this section is clear and explicit, but still, in its application it must be confined to such defendan's as had an opportunity of interposing the objection or challenge therein allowed. To such persons as were bound over to answer a criminal charge, or awaited in custody, the return of the grand jury, all such persons would have an opportunity, and this section clearly gives them the right of objecting to the grand jury, or an individual juror, before they are sworn, and if they do not do it at the proper time, they are forever barred from objecting afterwards. But can it be said that these persons who are in no manner charged with a criminal offense, and who cannot anticipate that a criminal charge will be preferred before the grand jury against them, must appear on the morning of the first day of the court, and interpose an objection to the grand jury, and if they do not do it, and are afterwards indicted, that they should be precluded from asserting that the indictment was found by a jury entirely unauthorized by law? If so, then as a matter of safety, the people of the county ought to resort to the court house, and if there are any legal objections to the grand jury, make them, and have their objections entered of record, so as to make them available in the event that an indictment is found against them. Who does not know that many innocent persons are indicted, and the truly innocent man not dreaming of being charged with crime, must also for his own safety, make his objection to the grand jury before they are sworn, or suffer all the expense and trouble of a trial before the petit jury. Persons are often charged before the grand jury with a violation of the criminal law, and are they to be deprived of all objection to the illegality of the grand jury, because these objections were not made before they were sworn? The constitution has declared that no person shall be held to answer for a criminal offense unless on presentment or indictment by a *grand jury*. If the indictment is not found by a legal grand jury, it is not found by

a grand jury at all, and therefore a person cannot be held to answer an offense charged in an indictment found by a grand jury unauthorized by law. If the construction contended for by counsel for the state is to prevail, and the defendant is to be tried on the indictment, although found by a body of men unknown to the constitution or law, then indeed a man may be tried and punished without being first indicted, and this valuable provision of the constitution utterly disregarded.

But it is said that the defendant did not file the proper plea as required in chapters 171, 172 and 173 of the Code. In reply to this we have only to say that the defendant filed the only plea which he could file to present the question of the legality of the grand jury. He could not demur to the indictment as it did not appear upon its face that the grand jury had no legal authority to inquire into the offense. There is no provision made in the Code for a plea of any kind to raise the question while the defendant had a right to have decided, and it may be said that strictly speaking, there is no authority for the plea filed. But we have only to remark that the legislature cannot by any enactment compel a person to be put upon trial for a criminal offense until he shall have been first indicted by a grand jury. The records in court showed the fact that the grand jury which found the bill, was no grand jury, and that the defendant was held to answer a criminal charge without being first indicted, as required by the constitution. This we think a defendant has a right by virtue of the constitution to show, when the facts exist, on record in the court when indicted, and that the Legislature cannot by restricting to particular pleas deprive him of such right.

In relation to the instructions of the court, we have only to say that the court erred in permitting testimony in relation to the character of a house described in the indictment as situated on block 26. Only ordinary certainty in the description is required, but still the description should be

sufficiently specific to point out with reasonable certainty the house indicted, so that the building could be preceded against to final judgment and siezure without any uncertainty as to where it was located. The indictment ought to state the lot or part of lot, block and town, or city, where situated, or if in the country the piece of ground sufficiently specific so as to leave no reasonable doubt as to its locality.

Judgment reversed.

A. Hall and *D. P. Palmer* for plaintiff in error.

J. C. Knapp, for the State.

ELBERT *v.* WILSON.

Where a lease stipulates that the tenant should cultivate land in a good farmer-like manner, and keep the fences in good repair, and where the tenant permitted the fences to become dilapidated, and suffered sheep to go in the orchard, by which young fruit trees were destroyed, the landlord may recover in assumpsit under the lease.

ERROR *to Davis District Court.*

Opinion by GREENE, J. Assumpsit by J. D. Elbert as landlord, against E. Wilson, for neglecting to cultivate a farm in a husband-like manner, as stipulated in the lease. Plea non-assumpsit. Verdict and judgment for defendant.

In the lease, the defendant agreed "to cultivate said tillable lands in a good farmer-like manner and in good season," in "corn, wheat and oats, principally," to deliver one third of each, &c., and "to keep the buildings and fences in good repair."

By the declaration, and on the trial, plaintiff claimed that defendant did not cultivate the farm in a proper manner, whereby the crops and his rents were less than they should have been; that he suffered the buildings and fences to pass into a dilapidated and ruinous condition, whereby his rents and the value of the premises were much diminished; and that defendant agreed, in renting the premises, to take good care of the fruit trees, shade trees, &c., but that they were much injured and deteriorated in value. Plaintiff claimed damages to make up the deficiency in rents, and the injury to the premises occasioned by bad husbandry.

To the instructions and rulings of the court below, several exceptions were made, and are now assigned as error. Among the errors assigned, there is but one which we deem it material to consider.

As an injury to the premises, the plaintiff claimed that the defendant permitted sheep to eat bark from his fruit trees, and thus destroyed or greatly diminished their value. Upon this point the court instructed the jury that, this fact "if true, would be *waste*, a *wrong*, for which another action than this would be necessary to get redress, unless the lease contained an agreement that he would not do this wrong, in which case it might be considered in this action, and the diminished value be made up in damages. The defendant insists that the lease contains no stipulations which will make injuries to, or destruction of trees a breach of contract, and this is the opinion of the court; therefore, you are instructed that injuries to trees upon the premises are not to be taken into consideration." This instruction is claimed to be erroneous. It is true, as claimed by the instruction, that there is no stipulation in the lease in relation to the care or preservation of the trees, but as the trees appear to have been upon a portion of the leased premises, which was in the possession and under the care of the tenant by virtue of the lease, there was at least a

strongly implied agreement on his part, as lessee, to use the trees, and all other improvements in his charge, with ordinary care, and in a husband-like manner. 5 T. R., 373; 6 Ves., 328. Any injury, resulting directly from neglectful or improper tillage, or from neglectful or improper care of the improvements in his possession, would be in violation of that implied agreement. If a tenant, by negligence or otherwise, permits sheep to go among fruit trees, with their known propensity to eat the bark from young trees, it is an instance of bad farming, and is a violation of that good husbandry which the lessee promised.

The lessee expressly agreed that he would cultivate the tillable land in a good farmer-like manner, and in good season for each crop. He could not do this, and at the same time suffer the fences to become impaired, and the sheep to go upon such tillable land and destroy the fruit trees. Such an injury would be the direct result of bad farming.

The lessee bound himself "to keep the buildings and fences in good repair." The declaration avers that these were suffered to pass into a ruinous and dilapidated condition. An injury to the premises, traced as the direct result of ruined and dilapidated fences, would doubtless subject the lessee to damages under the lease. Sheep passing through those dilapidated fences, and injuring fruit trees, would be an injury, traceable to a neglect of that stipulation in the lease.

Still the court below charge that this would be "waste, for which another action than this would be necessary." Although an injury to trees is ordinarily considered a waste, the injury in the present case is very far from being a *voluntary waste*. It is nothing more than *permissive waste*, which may result from an express or implied agreement to keep in repair. As the ancient writ of waste has been generally superseded, it would not be unusual to bring an action on the case, for failing in such express or implied

undertaking. Even when the lessee covenants not to do waste, the lessor has his election to bring either an action on the case or of covenant for waste done during the term. 2 Saund., 252; 2 Bl. R., 1111. Such being the remedy for a *voluntary* waste, we think this case, in assumpsit, appropriate for a permissive waste, under the express and implied promises as in the case at bar.

We conclude, then, that the court below erred in the instruction to the jury. A trial *denovo* is therefore ordered.

Judgment reversed.

A. Hall and *D. P. Palmer*, for plaintiff in error.

Wright & Knapp, for defendant.

COURRIER *et al. v.* CLEGHORN *et al.*

Where an affidavit is made for a writ of attachment against only one of two joint debtors, and does not show that the other is solvent or a non-resident, the attachment against the one should be quashed.

An attachment should only be issued when it seems necessary to secure the debt.

Where an affidavit is filed for an attachment against joint obligors, it should show that they all come within the provisions of the statute, or the writ should not be issued.

An attachment bond should be made for the benefit of the party against whom the writ is issued.

APPEAL *from Mahaska District Court.*

Opinion by KINNEY, J. The appellants filed their petition against Courrier & Adams as late partners, claiming the sum of three hundred dollars, and stating as the cause

of such claim, that the defendants executed a promissory note to the plaintiffs for the sum of two hundred and sixty nine dollars and ninety-seven cents, a copy of which is given and reads as follows:

$269,97. Keokuk, June 10th, 1851.

Thirty days after date we promise to pay to the order of Cleghorn & Harrison, two hundred and sixty-nine 97-100 dollars, for value received, negotiable and payable at Keokuk without defalcation or discount and with interest at maturity, at the rate of ten per cent. per annum.

COURRIER & ADAMS.

An affidavit was filed by Cleghorn in which he states that Royal S. Adams, one of the firm of Courrier & Adams is about to dispose of, or remove his property out of the State, without leaving sufficient remaining for the payment of his debts, and that Andrew Courrier and said Royal S. Adams, late trading under the firm and style of Courrier & Adams, are indebted, &c. A writ of attachment is asked to issue against the goods and estate of said Adams.

A bond was filed, payable to said Courrier & Adams, and conditioned for the payment of all damages which the *defendants* might sustain by reason of the wrongful suing out of the attachment upon this affidavit and bond, a writ of attachment was issued against the goods and estate of said Adams, by virtue of which his real estate was duly attached.

The defendant, Adams, came into court and filed a motion to quash the attachment for the following reasons: 1st, There is no sufficient bond on file. 2nd, The writ is issued against only one of the firm and should have been against both. 3d, The affidavit is only against one, and the motion against both. 4th, There is a variance between the petition and a writ of attachment; the attachment is against one of the defendants. This motion the court overruled, and as we think improperly. The note was a firm note, and the petition sets forth that the defendants as a late firm &c., are

indebted. Both the defendants are sued. The affidavit states that Royal S. Adams is about to dispose of his property, &c. The bond is given to the defendants, and the writ issues against Adams. These proceedings are irregular and the writ of attachment should have been quashed by the court. The note being a partnership note, given no doubt for the benefit of the firm, unless there was some evidence that Courrier, one of the late firm, was insolvent, and also that there was not partnership assets for the payment of the debt, an attachment ought not to issue against the private property of an individual member of the firm. The showing of the plaintiff in his petition, affidavit and the note, clearly establish the fact that these men were partners in business, and, that whatever the note was given for, was for the use of the firm, and we think because one of the members of the firm was about to dispose of his private property, unless there is something in the affidavit to raise a presumption against the solvency of the other joint obligor, that an attachment cannot issue. The object of an attachment proceeding is to enable a creditor to secure the collection of his debts. It is a violent remedy, and never was intended to be given only when the absolute safety of the debt would seem to depend upon a resort to this remedy.

The plaintiff should always make out by his own showing a *prima facie* case, by bringing himself within the requirements of the law, and then the writ in the first instance is a writ of right.

The statute in all its essential provisions should be substantially complied with, or he will take nothing by his proceeding. In this case it ought to have appeared in the affidavit that the defendants were about to dispose of their property, &c., or some reason offered why the plaintiff could not so state, either that the other defendant was a non-resident, or insolvent, or deceased—some excuse so as to inform the court why he proceeds against the private property of

only one of the obligers. For aught that appears in the affidavit, the firm, as such, was entirely responsible, and both obligors as such, in no way liable to this proceeding. Then we say, on a joint note like the one in this case, the affidavit must be filed against both to entitle the plaintiff to this writ, or some good cause shown in the affidavit why it cannot be so made. It would be unfair and contrary to the spirit of the law to permit a man to proceed against the private property of a co-obligor when from aught that appears he could have collected his debt in the ordinary way, by proceeding against both. Again, the attachment in this case aught not to have been issued upon the bond filed. The bond is made payable to Courrier & Adams. It states that whereas the said Cleghorn & Harrison have this day sued out a writ of attachment in the above entitled cause, referring to the cause of Cleghorn & Harrison against Courrier & Adams, the principal sureties on the bond are only liable for all damages sustained by the defendants, Courrier & Adams. The object of a bond is to afford security to the person whose property is attached, in case the writ is wrongfully sued out. It will be seen that the bond in this case is not given to Royal S. Adams, the only person against whom the writ was sued out, and the only one who could be injured in the event that the attachment issued without sufficient cause. The bond is given and payable to a certain firm of Courrier & Adams. To the defendant attached, it does not afford the least security, and he could not in his name maintain an action upon it. A bond is absolutely necessary to be given to the adverse party in order to entitle the plaintiff to his writ. It is a condition precedent to the issuing of the writ, and all attachment proceedings without a bond are void. In this case there was no bond given to Royal S. Adams, and on this account the writ should not have been sued out. All proceedings therefore upon the writ are erroneous and

should be set aside. The judgment of the court annulling the motion to quash is reversed at the costs of the appellees.

Judgment reversed.

J. A. S. Crookham, for appellants.

W. T. Smith, for appellee.

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BROOKS *et al. v.* ELLIS.

Where C. had a claim upon public land and relinquished the same to B., upon condition that he should advance the purchase money, enter the land and deed half of it to C., on his refunding his portion of the entrance money; held that the conditions were mutual, the considerations sufficient, and that a trust was created which took the case from the statute of frauds.

IN EQUITY. *Appeal from Davis District Court.*

Opinion by GREENE, J. Edward Ellis filed a billagainst James Brooks and R. Wilkerson to recover title to land which had been entered by Brooks in trust for Ellis. It seems that Ellis had a settler's claim on eighty acres of timber land, and entered into a contract with Brooks, by which it was stipulated that Brooks should enter forty acres of the claim in his own name, and subsequently deed half of it to Ellis, upon his paying the entrance money —$1.25 per acre—with ten per cent. interest. Brooks furnished the money accordingly, and entered the land. Ellis subsequently tendered his portion of the purchase money to Brooks, and demanded a deed, but the deed was refused.

These facts are distinctly avowed in the bill. Brooks' answer admits most of the bill, but denies that the claim of Ellis to the land was valid, and claims that the purchase money was to have been paid before it was tendered by Ellis. But the depositions sustain the bill in these particulars. The decree below was for complainant.

It is not necessary to detail the pleadings or evidence in order to understand the objections urged to the decree.

1. It is objected that the arrangement was without consideration, and void. The facts in the case show that Ellis had a legal claim upon the land. Such claims, under our statute, amount to a good consideration. Rev. Stat., 456, § 1; *Ellis* v. *Mosier*, 2 G. Greene, 247. Ellis relinquished his claim to Brooks, upon condition that B. should advance the purchase money, and enter the land, and deed half of it to Ellis on his refunding his portion of the entrance money. The conditions then were mutual; the consideration sufficient.

2. It is claimed that the case comes within the statute of frauds because the agreement was for an interest in lands and not in writing. Abstractly considered this objection appears well founded. But when we enter into the terms, connections and conditions of the agreement; when we consider that Brooks undertook, in contemplation of law to act as the trustee of Ellis; that Brooks' refusal to deed is so tainted with fraud as to justify a court in regarding him as trustee; that there was a joint interest and a joint purchase; that Ellis was in possession, and that the consideration between the parties was good and valid; when all these circumstances are considered, no doubt can be entertained that the case is fully removed from the statute of frauds.

That the facts in this case sustain, at least, a resulting trust cannot, we think, be questioned. *Elliot* v. *Armstrong*, 2 Blackf., 198; *Johnson* v. *Graves*, ib 440; *Boyd* v. *McLear*, 1 John. Ch., 582; *Doyle* v. *Sleper*, 1 Dana., 536; *McCoy* v. *Hughes*, 1 G. Greene, 370.

A case of joint interest and purchase like the present, does not come within the statute of frauds. 3 Mason, 347; 3 Biff. 15, 506.

A party attempting a fraud in such a case should be regarded as a trustee. 1 Page, 147; 1 Cooke, 166. Nor is the statute applicable to any case of resulting trust. 1 J. J. Marshall, 403.

We conclude then that equity has been done in this case.

Decree affirmed.

Wright and *Knapp* for appellant.

A. Hall, for appellee.

GLENN *v.* CARSON.

It is competent to show that a witness has made statements on other occasions at variance with his testimony on the trial, in order to impair his credibility.

APPEAL *from Van Buren District Court.*

Opinion by KINNEY, J. The only question raised by the bill of exception in this case, is as to the ruling of the court in relation to certain evidence offered by the defendant. The plaintiff introduced a witness, David Glenn, who on cross examination by defendant's counsel, was asked if he did not on the trial of the cause before Esq. Rathborn, at Iowaville, state that the hog was purchased by plaintiff from Vandover. The witness replied that he did not remember; that he did not think that he did. The plaintiff gave no evidence showing that he derived title through Vandover, but claimed, and his evidence tended to prove, that he

obtained title through Beikmore. The defendant after the plaintiff closed his evidence introduced a witness, Dowd, and asked him if he was present at the trial of the cause at Iowaville; the witness replied that he was present at two trials there; defendant's counsel then asked said Dowd what Glenn said as to the hog having been bought from Vandover. Plaintiff objected, but the court overruled the objection. We do not see any objection to this ruling. The object of the enquiry was to impeach the witness, Glenn, to show that he had made statements on other occasions at variance with his testimony on the trial; to prove that his reply to the interrogatory on his cross examination was not true. He stated that he did not think that he stated on the trial of the cause at Iowaville that the hog was purchased from Vandover. The attention of the witness ought to be called to the time and place, when the enquiry seeks to lay from his own testimony the foundation for impeaching him; so that the impeaching witness can with certainty identify the statement denied by the witness. If the interrogatory to the impeaching witness is not in relation to the identical fact denied by the principal witness, the impeaching evidence should be excluded. But in this case Dowd states that he was present at two trials. The witness denies stating that he said as above on the trial. We think Dowd's testimony was proper as to what the witness said on either trial. The enquiry of the witness is general, and would apply to either trial, but in point of place and time referring to the trial, is specific. He denies having made the statement at all on the trial, and therefore if it could be shown by the testimony of Dowd, who swears that he was present at both trials, that he did so state, we think it would have a tendency to impeach his testimony.

It is always proper to call the attention of the witness to any statement made by him, material to the issue, and if he testifies that he did not make it, or if he has made statements

out of court different from those under oath, the facts may be shown to impair his credibility.

Judgment affirmed.

A. Hall, for appellant.

Geo. G. Wright, for appellee.

PRITCHETT *et al. v.* OVERMAN.

Where the court recites the facts claimed to have been proved, and directs the jury that they are to determine whether the wrongs were perpetrated or the facts proved, it does not amount to an instruction upon the facts in the case.

Where a court charged the jury upon the legal effect of facts, and in impressive, argumentative terms, urges the support of the majesty of the laws against mob violence, it cannot be regarded as calculated to mislead the jury.

ERROR *to Wapello District Court.*

Opinion by GREENE, J. This suit was commenced by Abner Overman against Bird Pritchett *et al.* for false imprisonment. Plea, not guilty. Verdict of guilty, and damages assessed at one hundred and fifty dollars. Judgment accordingly. The only error urged in this court apply to the instructions given to the jury. It is claimed that those instructions are upon the facts in the case; that they are argumentative and calculated to mislead the jury. Upon a careful examination we find that no portion of the elaborate and detailed charge, assumes any fact to be proved. Upon every reference to facts the court state that plaintiff claims to have shown that certain things were done, and in substance concludes upon each point, that the jury are to determine whether the wrongs were perpetrated

or the facts proved; and if perpetrated or proved, the instructions explained the legal effect. The charge does nothing more than tell the jury what the law is as applied to the facts claimed to be proved, and tells them that they are to find whether the facts are or are not proved.

But it is claimed that the instructions are argumentative and calculated to mislead the jury. To this objection it must be conceded that the charge is long, earnest, and eloquent; that it describes the wrongs claimed to have been proved, in impressive, forcible and perspicuous terms; and it tells the jury with all the ardor of incensed justice that if these wrongs were perpetrated, how repugnant they are to the law of the land, how unjustifiable they were even if sanctioned by any self constituted, unauthorised combination of men, and how repulsive to the peace of society, to the quiet and harmony of the domestic circle, and to the natural and legal rights of citizens. As the evidence is not before us, we cannot well determine to what extent these unusually impressive and labored instructions may have been justified by the circumstances of the case; we must therefore presume that they were appropriate.

But if the plaintiff succeeded in establishing the material facts, which he claimed to have proved, the condition of the country, the prejudiced state of society, and the depraving influence which the prevalence of mob law may have had upon the minds of the jurors, might well justify the bold position and fervent expressions of the court, as an exponant of the law, as an administrator of justice, and as a conservator of the peace.

It may be well to remark, finally, that upon a careful perusal of the entire charge, we see in it no proposition or conclusion that is in conflict with any established rule of law, and that it is not pretended that the damages assessed by the jury are excessive. As the charge, was not upon facts, but only upon the legal effects of them, if the jury found them to be proved, and as it was argumentative in

support of the majesty of the law, we think it was not calculated to mislead the jury.

Judgment affirmed.

Geo. G. Wright and *H. D. Ives*, for plaintiff in error.

H. B. Hendershott, *A. Hall*, *C. W. Slagle* and *G. Acheson*, for defendant.

L. RALSTON *v.* RALSTON *et al.*

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A crop of wheat growing upon land at the time it was set off and confirmed to the widow as dower, will pass with the land and be considered a part of her dower estate, unless expressly reserved.

APPEAL *from Wapello District Court.*

Opinion by KINNEY, J. Louisa M. Ralston filed a petition claiming one hundred and fifty dollars, and stating as the cause of such claim that her husband, Robert Ralston, died on the 19th day of October, 1851, seized, in fee simple, of certain lands; and that a certain piece of land embracing the homestead, was on the 12th day of March, 1852, set off, and confirmed to her as her dower. That on the land so set off, there was growing a large crop of wheat; and that subsequently the said defendants entered upon the said land, and cut and harvested there from the wheat, &c. The answer of the defendants admit all the averments contained in the petition, but state that the wheat was sown in the life time of said Robert, and growing on said land at the time of his decease, and that Mathew Ralston was appointed executor of the estate of said Robert, and that as such

executor he had a right to enter upon the land and harvest and carry away said wheat. To this answer there was a replication, and to the replication a demurrer; and the decision of the court sustaining the demurrer is assigned as error. The record presents only one question: is the widow, or the executor, entitled to the wheat. It will be observed that the admeasurement of the land, and confirmation by which the dower was set off to the widow, took place before the wheat was harvested. By the Code, it is provided "that one-third in value of all the real estate owned by the husband during coverture, except such as has been sold on execution or other judicial sale, and to which the wife has made no relinquishment of her rights, shall be set apart by the executor as her property in fee simple, if she survive her husband." § 1294.

In lieu of a life estate as formerly, the widow by virtue of this section, is entitled to one-third of all of the real estate in fee. Does the fee of which she becomes the sole owner, carry with it the growing crops, or do they as at common law pass to the executor for the payment of the debts? It is well settled now by the authorities, that if A sells a farm to B, on which there are growing emblements, and does not make a special reservation of such emblements, that they pass with the title to B. Upon like analogy when the dower of the widow was set apart to her and the proceedings in relation thereto confirmed, she became the absolute owner in fee to the quantity of land so set apart, entitled to its free, full and perfect enjoyment. The Code has defined the words "real estate by making them include lands, tenements and hereditaments, and all rights thereto, and interests therein, equitable as well as legal." § 26. The growing wheat was an interest which belonged to the soil; it was an interest embraced in the phrase "real estate," and as much belonged to the widow as the owner of the real estate. Although the fee had been conveyed to her by deed without any reservation of the growing crops.

By the definition given to these words by the legislature, the growing emblements, being an interest in the land, they would pass with the land by sale conveying the real estate, or by will, or by operation of law, as perfectly as any fixture or appurtenance belonging to the land. Judgment sustaining the demurrer reversed and the cause remanded for trial.

Judgment reversed.

Geo. B. Wright and *H. B. Hendershott*, for appellants.

A. Hall and *Jas. Baker*, for appellees.

M. Ralston *et al. v.* Ralston.

Where the wife's dower has been set apart to her, agreeable to the Code, §§ 1294, 1295, and where her intestate husband left no issue, she is entitled to one-fourth of the remaining two-thirds, equal to one half of the entire estate, after paying the liabilities.

Opinion by Greene, J. Petition for partition filed in this case under the Code to which a demurrer was filed and overruled. In the petition the following facts are stated: That the petitioner, Louisa M. Ralston, was married to Robert Ralston, October 16, 1851, that on the nineteenth of the same month, Robert died, leaving no issue; that at Robert's death, he was possessed of personal property to the amount of $375 or $400, also had a fee simple title to 334.19 acres of real estate, which is described in petition; that Robert left a number of brothers and sisters (naming them) as his heirs; that her dower interest in said real estate, consisting of one-third of its value and comprising eighty acres, was set apart to her by referees, and the admeasurement

confirmed March 15th, 1852; that petitioner is joint owner with the defendants as brothers and sisters of Robert, deceased, in all of the real estate of Robert, except the eighty acres which had been set apart to her as dower, and claims to own the undivided one-fourth part of said joint estate with the defendants, Matthew Ralston and others who owned the other three-fourths of the joint estate; that the estate is not indebted to an amount greater than one hundred dollars, and that there are ample means aside from the realty to pay off all just demands against the estate; that the eighty acres set off to her as dower is nearly destitute of timber, and that the N. E. fr. ¼ of N. E. ¼ of Sec. 4, T. 71, N of R. 15 W. lies adjoining that which she had secured as dower, and contains a portion of the timber belonging to the joint estate and does not exceed in value the fourth part of said estate, and may be set off to petitioner without injury to the remaining portion, and that such allotment would be the most equitable and fair to petitioner and not detrimental to defendant's interest. The petitioner asks the court to settle the respective shares in interest, and direct partition to be made by referees.

It is contended that the court erred in overruling the demurrer to this petition. The cause of demurrer chiefly relied on, and the only one necessary to be considered is, that the petition shows that the petitioner elected to take her dower, and that the same had been duly assigned to her, and hence it is claimed that she had no interest in the remaining two-thirds of the estate.

The decision of this question depends entirely upon the construction of section 1410 of the Code, which provides: "If the intestate leave no issue, the one-half of his estate (including the dower of his wife) shall go to his father, and the other half to his wife," &c. The question arises, can the fact that the wife's dower had been set apart to her, agreeable to the Code, §§ 1294, 1295, impair her rights under the above section, 1410? We think not. The wife

of the intestate, whether he had issue or not, is entitled to "one-third in value of all the real estate upon death of the husband if she survive him," exempt from liability for debts. If the intestate leave no issue she is also an heiress with his father, or with his heirs, (Code, § 1411,) in the residue of the estate, if such residue after paying debts, exceed in value the dower estate set apart to her. In the present case the real estate of the intestate can not be impaired in value by his debts as the personal property amounts to more than enough to pay them; consequently the wife is entitled to one-fourth of the remaining two-thirds of the estate, which, with her dower, would be equal to one-half of the entire estate, leaving the remaining half to the father, or to his heirs.

We cannot for a moment entertain the opinion that the legislature in such a case intended to give one-half of the wife's dower to the father. That clause within brackets, in relation to the wife's dower, was merely inserted to show that the father was to have one-half of the entire estate to be estimated by including the amount of the dower which had been set apart to the wife.

We think, then, that the court below did not err in overruling the demurrer, and that the petition sets forth good reasons for a partition.

Judgment affirmed

A. Hall and *Jas. Baker*, for appellants.

Geo. G. Wright and *H. B. Hendershott*, for appellee.

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CRITTENDEN *v.* STEELE.

S. gave J. a letter of credit on C. for paper, in which he promised as follows: "If you will fill his order I will be responsible;" held that this was an original undertaking, and a failure to aver demand and notice in the petition is not good ground for a general demurrer.

Under the Code formal defects are not demurrable, and substantial defects should be demurred to specially.

APPEAL *from Van Buren District Court.*

Opinion by KINNEY, J. Suit brought against Steele on the following letter of credit:

KEOSAUQUA, September 25, 1850.

MR. H. CRITTENDEN—*Dear Sir:* Mr. O. E. Jones wishes to purchase some paper on short time. If you will fill his order I will be responsible. WILLIAM STEELE.

Refer to Tevis Scott & Tevis, or W. B. Cox.

The plaintiff claims in his petition one hundred and fifty dollars, and states as the cause of said claim, that the defendant executed the above letter of credit directed to the petitioner and delivered the same to said Jones, who delivered the same to the plaintiff upon which he delivered to said Jones the paper as set forth in the petition, amounting to ninety-six dollars and sixty-three cents, on sixty days time. To this petition the defendant filed a general demurrer, also an answer. For answer, he states that he is not indebted to the plaintiff in any sum. That he had no notice that said plaintiff credited said Jones at all, and that said Jones was solvent and able to pay said note when the same became due, but afterwards became insolvent, and that he has since become worthless and left the country.

It appears from the record that the cause was tried upon the demurrer to the plaintiff's petition and the demurrer sustained. This was error. The petition showed *prima facie* a right of action. The undertaking of Steele was

original, and not collateral, and hence demand upon Jones and notice to Steele were unnecessary, and if unnecessary, such demand and notice need not be averred in the petition. But if it were necessary to aver demand and notice in order to charge Steele, the absence of such averment could not be regarded as sufficient to justify the court in sustaining a general demurrer. The petition would then be substantially defective, and could only be reached by special demurrer setting forth the true grounds of objection. § 1754, Code. Demurrers for formal defects are abolished, and demurrers for substantial ones must point them out with reasonable clearness, so as to enable the opposite party to amend in the event that the demurrer is sustained. Judgment of the court sustaining the demurrer reversed, and cause remanded for trial.

Judgment reversed.

A. Hall, for appellant.

J. C. Knapp, for appellee.

Davis *v.* Cook.

In an action for malicious prosecution the plaintiff must not only prove malice, but he must also show a want of probable cause.

Appeal *from Mahaska District Court.*

Opinion by Greene, J. David Cook filed a petition against Joseph Davis for malicious prosecution. Answer, denies all the allegations of the petition. Replication avers truth of petition. Verdict for the plaintiff, and his damages assessed at one hundred and fifty dollars.

On the trial, the court instructed the jury as follows: "The plaintiff must satisfy you that the defendant has caused a prosecution to be instituted against the plaintiff, and that such prosecution has terminated in an acquittal of the plaintiff. The plaintiff must also satisfy you that the prosecution was malicious. If the plaintiff establishes these two allegations he is entitled to recover, unless the defendant satisfy you that there was probable cause for the prosecution." In giving these instructions, it is contended that the court below erred.

In actions for malicious prosecution the rule of evidence is well settled, that the plaintiff must not only prove malice, but that he must show a want of probable cause. 3 Blackf., 244; 2 Greenl. Ev., §§ 453, 454; 2 Stark Ev., 681. The *onus probandi* of showing a want of probable cause does not devolve upon the defendant, but that fact must be shown *prima facie* by the plaintiff before he can recover. Upon this point, then, the charge to the jury was erroneous, and a trial *denovo* must be awarded.

Judgment reversed.

C. Negus and *J. A. L. Crookham*, for appellant.

E. W. Eastman and *B. Rice*, for appellee.

ROBINSON *v.* TURNER.

Where a witness is shown to be interested as a partner by other witnesses, he is not competent to testify even as to his interest on *voir-dire*.

APPEAL *from Jefferson District Court.*

Opinion by KINNEY, J. It appears from the bill of exceptions taken on the trial of this cause that the plaintiff

produced one Nathan Turner as a witness to prove the claim of plaintiff. The defendant then introduced evidence tending to prove that said Nathan Turner was a partner of said plaintiff in the purchase of hogs, and interested in securing the money sued for as such partner. Amongst other things shown, it appeared that said Nathan Turner had claimed or pretended to be a partner and had spoken of his loss in such pork business, and therefore the plaintiff called said Nathan Turner to explain such statements on his *voir-dire* to which the defendant objected, but the court overruled such objections and permitted the witness to testify. It is claimed that in this the court erred. After the witness had been called and examined, and the party against whom he had testified had shown his interest *aliunde*, could the witness be then recalled by the party first offering him and sworn on his *voir-dire* as to his interest? This is the question presented by the bill of exceptions. We think the witness could not be re-called to disprove by his own oath the evidence establishing his interest. The interest of the witness being shown *aliunde*, it is the duty of the court to rule out his testimony. But if he is permitted to restore his testimony upon his *voir-dire*, the effect is the same as though he were testifying in chief on the merits of the case. It would be unfair then to permit an *interested* witness to testify that he had no interest. His interest being once established *aliunde*, he is as incompetent to restore himself, as he would be to give evidence in chief. But, if when the witness was first called, objection had been made on the ground of interest, and being put on his *voir-dire* he had purged himself of any interest, the objecting party would have been bound by his testimony, and it has been held that he would be precluded from afterwards showing any interest except by the testimony of the witness himself. But in this case the party shows the interest independently of the witness, which he had a right to do, and as we have said, the witness could not be recalled by

the party offering him to explain or purge himself of such interest. The court erred in overruling the objection, and the judgment is reversed and the cause remanded for trial *denovo*.

Judgment reversed.

C. Negus, for appellant.

Stayle & Acheson, for appellee.

CUSHMAN *v.* BLAKESLY.

In a suit conducted by an administrator of an estate, where the father is the sole heir at law of the intestate, it is error, under the Code, to admit the father as a witness in behalf of the estate.

APPEAL *from Jefferson District Court.*

Opinion by GREENE, J. It appears by the bill of exceptions in this case, that the suit was commenced before a justice of the peace, by William Mills, by his next friend, John Mills; that the suit was appealed to the district court, and while pending there, the said William died; and thereupon Charles Blakesly as administrator was substitute as a party, and on the trial of the cause, said John Mills, the father and heir of William, was introduced as a witness in the cause, but as William died without wife or children the testimony of his father, John, was objected to on the ground of interest; but the court overruled the objection and admitted the testimony. In this it is claimed the court erred.

The court below, concede in the bill of exceptions, that at common law, the witness would be incompetent; but

admits his testimony under the Code, §§ 2388, 2390; still even under the code, we think the witness was erroneously admitted. As the sole heir at law of the plaintiff, his deceased son, he had a direct, certain, legal interest in the event of the suit, and was therefore rendered incompetent by § 2390 of the Code.

The interest was as certain, as direct, and as legal in the suit, as his son's could have been if living. In a word, he was the only person as the successor of his son, who was directly interested in the successful prosecution of the suit.

Judgment reversed.

Chas. Negus, for appellant.

Slagle and *Acheson*, for appellee.

LOCKARD & CO., *v.* EATON.

A petition for attachment, under the Code, should aver one of the following facts: That as plaintiff verily believes the defendant is a foreign corporation, or is acting as such; or is in some manner about to dispose of his property with intent to defraud his creditors; or is in some manner about to remove his property out of the state, without leaving sufficient remaining for the payment of his debts, with intent to defraud his creditors; or has disposed of his property in whole or in part, with intent to defraud his creditors; or has absconded so that the ordinary process cannot be served upon him.

APPEAL *from Wapello District Court.*

Opinion by GREENE, J. This was a proceeding under the Code by attachment. A motion in the court below to quash the attachment was sustained. The petition for attachment is duly sworn to, and avers "as plaintiffs then

verily believed the said defendant is in some manner about to dispose of his property, without leaving sufficient remaining to pay his debts." The court decided that these allegations are not sufficient to justify an attachment, and this decision is claimed to be erroneous.

The Code, § 1848, provides that, "the petition which asks an attachment, must state that as the affiant verily believes the defendant is a foreign corporation, or acting as such; or that he is a non-resident of the state; or that he is in some manner about to dispose of or remove his property out of the state, without leaving sufficient remaining for the payment of his debts; or that he has disposed of his property, in whole or in part, with intent to defraud his creditors; or that he has absconded, so that the ordinary process cannot be served upon him." In the quotation of this section we have slightly changed the punctuation, to meet, as we think, the intention of the legislature.

We agree with the court below that the petition does not contain the necessary averments. We cannot believe that the section referred to, contemplates the oppressive process of attachment, when a party, having more or less property, attempts to sell or remove a portion, in good faith, without intent to delay creditors. If so, a man having only enough, or less than enough property to pay his debts, could not offer to dispose of or remove any portion of it, without subjecting himself to the ruinous effects of an attachment, even if he should attempt the sale or removal for the express purpose of applying the proceeds to the payment of debts.

To our mind it is clear, that this violent process was intended as a remedy against the following classes of debtors only: 1st. Foreign corporations or those acting as such. 2d. Those who are about to dispose of their property with intent to defraud their creditors: 3d. Those who are about to remove their property out of the state without leaving sufficient remaining for the payment of their debts, with intent to defraud their creditors. 4th.

Those who have disposed of their property with intent to defraud their creditors. 5th. Those who have absconded so that the ordinary process cannot be served upon them. Against such debtors only, can an attachment legally issue under § 1848 of the Code.

As this section is far from being free from ambiguity, we will state what we believe the legislature intended the requisites of a petition for attachment to be, as applied to each class of debtors. 1st. It must state, that as plaintiff verily believes, the defendant is a foreign corporation, or is acting as a foreign corporation. 2d. Or as plaintiff verily believes the defendant is in some manner about to dispose of his property, with intent to defraud his creditors. 3d. Or as plaintiff verily believes the defendant is in some manner about to remove his property out of the state, without leaving sufficient remaining for the payment of his debts, with intent to defraud his creditors. 4th. As plaintiff verily believes, the defendant has disposed of his property in whole or in part, with intent to defraud his creditors. 5th. Or as plaintiff verily believes, the defendant has absconded so that ordinary process cannot be served upon him.

As the reasons for this construction of the section will suggest themselves to most minds, we deem it useless to enlarge upon them.

In the present case, it appears that the court below did not err in quashing the attachment.

Judgment affirmed.

H. B Hendershott, *J. C. Hall* and *C. H. Phelps*, for appellants.

W. H. Brumfield, *C. W. Slagle*, and *G. Acheson*, for appellee.

Miles *v.* Townsend *et al.*

On a motion for a non-suit at the close of plaintiff's testimony, the court should consider every fact fully proved which the testimony tended to prove, and if those facts are not sufficient at law to justify a verdict and judgment for plaintiff, the non-suit should be granted.

Where money was furnished by plaintiff under a written agreement that it should "be laid out in claims on land, for which he is to have the principal and one-half the profit arising thereon," and the evidence showed that the money was accordingly invested, and nothing realized from the claims; held that plaintiff could not recover in assumpsit on common counts, and that as the evidence tended to show the foregoing facts only, the court was justified in taking the case from the jury and granting a non-suit.

Error *to Jefferson District Court.*

Opinion by Greene, J. This was an action of assumpsit commenced by H. Miles against N. Townsend, and others, for money loaned, &c. Plea, general issue. The cause was submitted to a jury, and after the plaintiff had introduced his testimony, the defendant moved for a non-suit, which was granted.

It is now claimed that the court was not justified in taking the case from the jury, and in granting the non-suit. If this ruling was made upon the strength or sufficiency of the proof to establish the facts upon which plaintiff's claim rested, and if those facts would justify a recovery at law, it follows that the court interfered with the province of the jury. The testimony introduced conduced to establish certain facts, and on taking the case from the jury it must be conceded that those facts were fully established, and the question arises, would those facts in law justify a judgment in favor of plaintiff? *Wiley* v. *Shoemak*, 2 G. Greene, 205.

The entire testimony presented by the bill of exceptions is corroborative of a receipt which shows the nature of the

contract between the parties, as follows: "Received of Hiram Miles, two hundred and forty seven dollars and fifty cents, to be laid out in claims on land, for which he is to have the principal and one-half the profits arising therefrom, by either." This receipt was signed by defendants, and in connection with the parole evidence shows a joint adventure in claim speculations. The defendants were to select, purchase, and hold claims, and on final sale were to refund to plaintiffs the principal furnished by him and one-half the profits. The investments were to be made near the newly selected capital of Iowa, Monroe City; but with the failure of that prospective seat of government the claim speculation of the parties exploded. The money had been invested in claims on joint account, but those claims could not be converted into money as contemplated by the contract. There was no evidence tending to show that the defendants had acted in bad faith, or neglected their part of the undertaking, or had realized anything from the claims, or to show that they had assumed a personal liability. Hence we conclude that there was no evidence tending to prove plaintiff's common counts for money loaned. No part of the testimony tends to show that the money was loaned on personal responsibility, but it all goes to confirm the written contract that it was furnished on joint account, had been invested accordingly, and nothing realized from the investment, and under these facts, and the construction placed upon that contract, we conclude that the court did not err in granting a non-suit.

Judgment affirmed.

Wright and *Knapp*, and *J. A. L. Crookham*, for plaintiff in error.

Slagle and *Acheson*, for defendant.

BLAKE *v.* COATS *et al.*

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Where land is leased for one-third of the crop, to be delivered to the lessor, he is liable in trespass if he goes upon the demised premises and takes corn therefrom.

ERROR *to Wapello District Court.*

Opinion by GREENE, J. Trespass commenced before a justice of peace by Coats and McDonald against Blake. Plaintiffs recovered before the justice, and also in the district court.

It appears that the plaintiffs were tenants of the defendant, and had rented his ground to work on shares, stipulating to pay a rental of one-third of the crop raised, and to deliver the same to defendant. The defendant had entered the field and taken therefrom a portion of their corn crop. The court instructed the jury that on such a state of facts the plaintiffs could recover. To this instruction it is objected that the parties had a joint legal interest in the crop, and that, consequently, the tenants could not recover in trespass.

The facts that the tenants were to pay for their possession and use of the premises, one-third of the crop raised, would not create a partnership between the landlord and his tenants, nor divest these tenants of their rights of possession under the lease, even against the landlord. Although the products of the farm were to be shared between the landlord and tenants, the possession was not to be so shared. It was in consideration of that possession that the tenants were to deliver the share of the crop stipulated, and consequently so far as possession was concerned, the tenants occupied the same relation to their landlord as though they had stipulated to pay a cash rent.

We think the instruction given to the jury was applicable to the case, and correct in principle. In substance, the

instruction directed the jury that the landlord was liable in trespass, if he entered upon the possession which he had granted to the lessees, and took corn therefrom. Injury to the possession is, at law, the foundation to an action of trespass.

Had the lessees been entitled to a share of the growing crop on a designated part of the premises, he would, no doubt, have had a right of entry on that particular part, but where, as in this case, the lessor was to have his share of the crop delivered in the crib, the lessees alone were entitled to possession, and could maintain trespass even against the landlord for a breach of the demised premises. This view is sustained in *Woodruff* v. *Adams*, 5 Blackf., 317; 3 Kent., 472, 473; 4 ib. 119; 1 Chitty. P., 196; *Dockham* v. *Parker*, 9 Greenl., 137; *Wilbur* v. *Paine*, 1 Ham., 251.

Judgment affirmed.

H. B. Hendershott, for plaintiff in error.

Geo. G. Wright, for defendant.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

FORT DES MOINE, NOVEMBER TERM, 1852.

In the sixth year of the State.

PRESENT:*

HON. JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

PERRY *v.* THE STATE.

An accusation against an attorney should so specify the words alleged to be insulting, and so describe the acts alleged to be disrespectful, that the accused may know what words or acts he is called upon to defend.

An attorney may be rejected from the bar for making a false oath or a false professional statement.

Where the evidence against an attorney tends to establish only two or three of the charges against him, and leave the other charges without any proof, a judgment goes too far which finds him "guilty of the charges in said accusation."

The finding or judgment should specify the particular charge or charges upon which an attorney's guilt is pronounced.

* Judge WILLIAMS's attendance prevented by sickness.

APPEAL *from Polk District Court.*

Opinion by GREENE, J. Lewis Todhunter filed, in the district court, an accusation against John M. Perry, a practising attorney. The accusation charges that Perry destroyed, so far as he could, the respect due the court, by insulting language to the judge while officially occupied; that he disobeyed an official order of the court; that for the purpose of sustaining a certain cause confided to him, he employed other means than those which were consistent with truth, and voluntarily became a witness, and as such, swore to statements that were not true; that in the same case he tried to mislead the court by a false statement of facts, to-wit: that there was a credit on a certain memorandum book, in the possession of Wm. C. Buzick, a witness upon the stand in the case, when in fact there was no such credit; and that he had been guilty of using offensive personalities to a member of the bar of said court, by calling said Todhunter a liar, during the sitting, and within the bar of said court. The above is the substance of the charges, to which defendant filed a demurrer, under the following specifications: 1. The accusation does not specially charge in what particular the accused has destroyed the respect due the court. 2. It does not specially charge in what case, or in what respect the accused disobeyed the order of the court. 3. It charges accused with false swearing, but does not allege that a conviction for perjury has been had for such swearing. This demurrer was overruled. In this, we think, the court erred. We consider the accusation defective, as specified in the first and second causes named in the demurrer. The accusation should specify the manner in which the court was treated disrespectfully. If it was done by insulting language, the

words used by the accused should be given; if by disrespectful acts, those acts should be described, so that the accused may know what words or acts he is required to defend.

The second charge in the accusation is as follows: "In disobeying the orders of your Honor while engaged in your official capacity." This, surely, is too general, and by far too vague. It should show what order he disobeyed.

So far as the third ground of demurrer is concerned, we only deem it necessary to remark, that if the accused made a false professional statement, or swore false, as specified in the accusation, a conviction of perjury was not necessary to justify the court in rejecting him from the bar. But as the first two causes were good, the court erred in overruling the demurrer.

The second error assigned is, that the finding and judgment of the court below is against the evidence. It appears by the record that the court "found John M. Perry guilty of the charges in said accusation." This finding, we think, goes much too far. While two or three of the charges are sufficiently established by proof, there is no evidence whatever upon which the other charges can be sustained. Some of these charges, upon which there is no proof of guilt, involve deep moral turpitude. However unjustifiable the conduct of the accused may have been towards the court, however undignified and ungentlemanly to call a brother of the same profession a liar, however unprofessional for an attorney to volunteer his own testimony to sustain a client's cause, still it is equally repulsive to cast upon him the odium of offenses which are in no way supported by proof. The finding or judgment should specify the particular charge or charges upon which this guilt was pronounced.

Judgment reversed.

C. Bates, for appellant.

J. E. Jewett and *W. W. Williamson*, for the state.

Brooks *v.* Hazen.

Where witnesses were called upon to testify in behalf of the plaintiff in relation to the difference in the value of a barn, as built by the defendant and that which the contract required, it was error to admit their estimates of that difference, if those estimates were formed alone upon plaintiff's statement of what the contract required. They should have been made upon the contract itself, and not upon the plaintiff's statement.

Appeal *from Polk District Court.*

Opinion by Kinney, J. Suit brought by Hazen to recover damages in consequence of a failure on the part of Brooks to build and complete a barn. The petition sets forth that the petitioner contracted with defendant for the purchase of a farm on which said barn was in the process of being erected, and that before the contract for said farm was reduced to writing, the defendant entered into another and different contract with the mechanics who were employed to build said barn, and changed the original plan, whereby said barn was to be built in an inferior manner, and upon an inferior plan, for the express purpose of cheating, wronging and defrauding the plaintiff.

The contract for the purchase of the land is set out and made part of the petition, in which it appears that "said Brooks agrees to build, perfect and complete in a good and workman-like manner the barn then in process of erection on said premises, the same being sixty feet long, by forty-eight feet wide including eave-jetters, porchese and sheds according to the original plan.

The defendant filed an answer denying all the material averments in the petition, denying also that he made a different contract with the mechanics who were to build said barn after he contracted with the plaintiff. He avers that he completed the barn in accordance with the contract, &c.

Several bills of exceptions were taken on the trial, by the defendant, to the ruling of the court upon the testimony; but we think there is no error in these several rulings, except in relation to the evidence given by the witnesses, McClelland and Ramage.

It appears that it became material to the issue for the plaintiff to prove what it would cost to complete the barn according to the original plan, and for this purpose he called McClelland and Ramage, who were carpenters, who swore that a few days before the trial, and after the commencement of the suit at the request of said plaintiff, they upon viewing the barn in controversy, made an estimate in writing of the value of the labor and materials that it would take to complete the barn, in a good and workmanlike manner, upon the plan and in the manner that said plaintiff told them that it should have been completed, according to the original contract, and thereupon the witnesses testified what it would be worth by their written estimate, and in their judgment to complete said barn, in the manner specified by the plaintiff, each at the same time, testifying that they knew nothing about the original plan except what the plaintiff told them. This evidence was objected to, on the ground that it was improper for the witnesses to testify what it would cost to complete the barn in the manner specified to them by the plaintiff, but the court overruled the objections.

In this the court erred. The plan as detailed by the plaintiff to the witnesses formed the basis of their calculation in computing what it would cost to finish the barn, and if permitted to go the jury, would constitute a criterion upon which to form their verdict for damages. According to the state of the pleadings, it became an important part of the investigation to ascertain what it would cost to finish the barn according to the original plan, and the plaintiff should have first established what that plan was, and then proved what it would cost to complete the

barn according to that plan; or if he choose how much less the barn was worth from what it would be if finished according to the plan and undertaking of the defendant.

If the defendant had been present at the time the conversation took place between the plaintiff and witnesses, in relation to the manner in which the barn was to have been built, and had not objected to the representations of the plaintiff, then it would furnish evidence that he consented to the truth of these statements, and he would be concluded from objecting to testimony predicated upon such statements. But as the testimony was introduced, it was formed upon conclusions drawn from what was detailed by one of the parties alone, and was no more nor less than testimony manufactured by that party for the purpose of being used upon the trial. If there had been evidence to show that the plan as stated by the plaintiff was the correct one, the case would assume a different appearance, but no such testimony is given, nor is the evidence of the witnesses received upon conditions that the plaintiff should follow it up with such proof. We think there can be no doubt about the error of the court in this particular.

Judgment reversed.

Casady & Tidrick, for appellants.

C. Bates and *J. E. Jewett*, for appellee.

HAMILTON *et al. v.* WALTERS.

Where the evidence is not brought up on appeal in equity, the finding of the court below upon the facts in the case will be regarded as conclusive.

An informal release of claim right to government land can impart no equity in the land after it has been purchased from the government.

An application for the appointment of a commissioner to take depositions made about the time set for the trial of the cause, was denied, and the court decided that as the cause had been set for trial at the previous term, and as the witnesses were in attendance, the trial should go on, and that the witnesses might be examined accordingly; held that the proceeding was justifiable.

Any action of the court below upon immaterial and irrelevant questions and answers in taking testimony, would not justify a change in the decision.

H. entered in his own name eighty acres of land in trust for W., and W. paid him the price agreed upon and took from H. an obligation to make a deed as soon as the patent should issue. H. subsequently assigned his duplicate to B., without consideration, and with notice that he had given a title bond to W., and B. soon after obtained a patent; held that B. might, in equity, be required to convey the land to W.

IN EQUITY. *Appeal from Marion District Court.*

Opinion by GREENE, J. Bill filed by James M. Walters, in which William L. Hamilton and Lysander W. Babbitt were made defendants. The bill alleges, in substance, that on the first day of March, 1850, the complainant engaged the defendant, Hamilton, to enter in his own name, at the Fairfield land office, the east half of the north-east quarter of section twelve, in township seventy-five, north of range twenty west, in Marion county, Iowa; that the land was entered with the agreement that if complainant paid, in a short time to Hamilton, the purchase money, and an additional amount for his trouble in entering the land, and as interest on his money, that Hamilton was to execute to complainant a warrantee deed for said land, whenever a patent should issue for the same; that under this agreement the land was entered by Hamilton, March 1st, 1850, and on

the fourth day of the same month complainant paid Hamilton the sum of one hundred and five dollars, the amount agreed upon as purchase money, and for trouble and *interest*, and therefore received from said Hamilton an instrument in writing, by which he stipulated that he had bargained and sold to complainant the land in question for the sum of one hundred and five dollars, and obligated himself to make a good warranty deed to complainant for the land, as soon as the patent should issue; that this instrument was duly recorded in Marion county, Iowa; that afterward, on the twelfth day of March, 1850, the said defendants fraudulently combined together for the purpose of depriving complainant of all interest in the land, and with that intent Hamilton, at the earnest solicitation of Babbitt, assigned to him the land office duplicate with the intention of having the patent issue in Babbitt's name, and thereby deprive complainant of all title to the land; that September 13th, 1850, the patent was issued by the United States to said Babbitt; that at the time the duplicate was assigned by Hamilton to Babbitt, and previous thereto, said Babbitt had express notice that Hamilton had entered the land at the request and for the benefit of complainant, also notice that he had made full payment, and had Hamilton's written agreement for the land; and that Babbitt paid Hamilton very little, if anything, as a consideration for assigning to him the duplicate. The bill concludes with the usual prayer, that the defendants be required to answer, and also for a decree that Babbitt convey to complainant, by warranty deed, the land in question.

Hamilton's answer admits every material allegation in the bill, and states that at the time, and before he assigned the duplicate, he informed Babbitt that complainant held his title bond for the land.

Babbit's answer also admits nearly every allegation in the bill; but it also alleges that Hamilton was fraudulently induced to enter the land for complainant; that he, Babbitt,

had, at the time the land was entered, an equitable interest in it, that he had purchased a claim to a portion of it, was in possession and had valuable improvements upon it, and that the facts were known by complainant, and that he fraudulently caused the entry to be made for the purpose of defrauding respondent; and that he paid Hamilton twenty-five dollars for the assignment of the duplicate. Other averments not responsive to the bill are contained in this answer, but are denied by complainant's replication under oath. Replication denies that Babbitt had any legal or equitable right to the land, but admits that he had a claim so called, and that there was some improvement upon the land.

Witnesses were examined in the court below, but as their evidence was not reduced to writing, we cannot be guided by their testimony. In a review of the case we can only be governed by the bill, answer and replication, and the few items of evidence which are brought to us by bill of exceptions. As the evidence is not before us, we must regard the finding of the court below upon the facts in the case as conclusive. In addition to the facts admitted by the answers, the court found that Babbitt paid Hamilton no consideration for the duplicate receipt which was assigned to him, and upon which he obtained the patent; and that the equitable title to the land is in complainant. Accordingly the court decreed that Babbitt should convey the land to complainant.

Upon the trial several bills of exceptions were taken, which we will proceed briefly to examine:

1. By the first it appears that Babbitt offered to introduce the record of a deed from one Ryan to him, to show that he had purchased Ryan's claim to a portion of the land before it was entered by Hamilton. It is now claimed that the court erred in sustaining the objection to this evidence. As the instrument was a mere informal release of claim right to government land, it could impart no equity,

nor give greater validity to the naked legal title which Babbitt had acquired by the patent, nor could it detract from Hamilton's right, or the right of any other citizen to purchase the land from government. In a word, it could in no way affect the merits or equities of the case, it had no material bearing upon the issue, and was, therefore, properly excluded.

2. By the second bill of exceptions it appears that about the time for trial and before the case was called, the defendant, Babbitt, requested the court to appoint a commissioner to take depositions to be used as evidence in the cause, which the court refused to do, but decided that as the cause had been set for trial at the last term, and as the witnesses had been subpœned, that the cause must be heard, and that the parties might examine the witnesses orally before the court. We see nothing oppressive or unauthorised in this ruling of the court. It is true that the evidence in the case should have been reduced to writing so that the parties might have had the full benefit of the evidence on appeal. If the application for a commissioner to take depositions had been made at the previous term of the court it would doubtless have been granted. But as the cause had been set for trial at the previous term and as the application was not made till the time of trial had arrived, we think the court was justified in overruling it.

3. The only remaining bill of exceptions contains many questions to witnesses, and answers, which it is urged were either improperly overruled or improperly admitted. Those which are represented as most objectionable in their admission or rejection, have, we think, no material bearing upon the case and however disposed of, could produce no change in the decision. Any action of the court below upon immaterial or irrelevant questions and answers in taking testimony, could not justify this court in reversing the decision.

So far as the record presents the case we cannot avoid an affirmance. Hamilton appears to have acted in trust for

complainant in purchasing the land. Complainant had paid the requested consideration, and acquired complete equity to the premises, and he alone was entitled to the legal title which had been secured for him by Hamilton. When Hamilton assigned the duplicate to Babbitt, he acted in violation of the trust which he had assumed, and for which he had been paid; he transferred a right which he had previously sold for a full consideration, and was virtually defrauding complainant. Babbitt had notice of complainants' rights, and cannot be regarded as an innocent purchaser.

As the land was subject to be *entered* by any person, Babbitt had the same opportunity to purchase it that complainant had, and as B. had it under a claim and improvement it is to be regretted that he did not make them available by securing title to the land. He can only attribute the loss to his own negligence. However strong the moral obligation may be to respect such claims and improvements, it is clear that no rule of law or equity can be found which could preclude a man from making such an entry or which could transfer the title acquired by the entry from the purchaser to the former possessory claimant.

Although the right to sell and purchase claims and improvements upon the public lands, is recognised by our laws so far as to make any sale of such improvement a sufficient consideration to sustain a promise, still such claim right can in no way impair or come in conflict with the title which a purchaser may acquire from the United States.

As the record presents the case to our consideration, we I can see no good reason for disturbing the decree below.

Decree affirmed.

Curtis Bates, for appellants.

Casady and *Tidrick*, for appellee.

Bondurant *v.* Taylor *et al.*

A mortgagor not required to pay the fees of the attorney employed by mortgagee in the proceeding to foreclose; nor can an attorney's fee be charged to a party merely because he executed a mortgage to indemnify mortgagee for indorsing his notes.

In Equity. *Appeal from Polk District Court.*

Opinion by Kinney, J. John T. Bondurant executed to Taylor and Henderson, a mortgage on certain lands to secure them as special indorsers on divers notes given by Bondurant to various individuals. Taylor and Henderson filed their bill to foreclose the equity of redemption to said lands, alleging that said notes, amounting in the aggregate to the sum of five hundred dollars, were paid by complainants. Bondurant being a non-resident, upon due proof of notice by publication, a decree *pro confesso*, was rendered against him, and the land sold to Taylor, to satisfy the decree amounting to five hundred dollars.

Subsequently Joseph Bondurant, the complainant in this suit, filed his bill to set aside this decree, alleging that after the mortgage to Taylor and Henderson, that the said John Bondurant, conveyed, for a valuable consideration, the said mortgaged premises to him by deed in fee simple. He charges that there was but a small sum if any due from said John to respondents; that John had paid off nearly all the notes on which they became special indorsers; he prays that an account may be taken of the amount due them, and that the complainant may redeem said premises from said sale, &c.

Taylor answers among other things that there was at the time of making the decree of foreclosure the sum of three hundred and twenty-six dollars and seventy-five cents due Taylor and Henderson for monies paid, and to be paid by them by reason of their liability as indorsers for said Bon-

durant, including also the amount due them. He also alleges that he has paid and is liable to pay about fifty dollars as attorney's fees on the various suits brought against John and defendants by reason of becoming his security, and for the foreclosure of said mortgage, and in the present suit, and the costs of suit.

The case was referred to a master commissioner in chancery to state an account between the parties, and ascertain the amount due from either, if any, and to report at the next term of the court.

Upon this reference the master examined witnesses in relation to the value of professional services in conducting the case of Henderson and Taylor, against John Bondurant in foreclosing the mortgage, as also in defending the present case of Bondurant against Taylor and Henderson, and reported to the court the amount testified by the witnesses to be a reasonable fee for conducting and defending said case.

Other items are included in the master's report, but these in relation to attorney fees being the only ones which we consider objectionable, it is not necessary to notice others. This report was excepted to, and one item of three dollars being stricken out, the report was then confirmed: whereupon the complainant appealed.

So much of the report of the master as related to attorney's fees should have been rejected by the court. The sum allowed was forty dollars, and this was not in any respect a legitimate charge against John Bondurant, the mortgagor. He neither directly nor indirectly assumed in the mortgage transaction to pay Taylor and Henderson the expense they might incur in foreclosing the mortgage. He certainly was in no manner benefited by such foreclosure, and hence they cannot recover by virtue of any implied promise of payment. If attorney's fees could be allowed in this instance then, indeed, upon the same principle, such fees would be a proper charge against mortgagors in all cases where the

mortgagee is required to foreclose in order to obtain the benefit conferred by his mortgage. Such has never been the practice, and there is no law or established precedent to justify such a rule.

The mortgage in this case was given as collateral security, and it may be said that the mortgagees were not in any manner benefited by the transaction, and therefore ought not to incur any expense. This does not change the situation which existed between the parties, or enlarge the indebtedness beyond the amount actually stipulated by the parties, and embraced in the mortgage. The necessary expense for professional services in bringing suit upon the mortgage, was a liability which the mortgagees incurred when they accepted the security as indemnity for becoming indorsers.

The allowance of twenty-five dollars for attorney's fees in defending this case in the district court is subject to still stronger objections than the allowance for foreclosing the mortgage. In this case John Bondurant is not a party. The suit is brought by a third person to set aside a decree which it is alleged has been improperly rendered. We are at a loss to know upon what principle John Bondurant would be liable for fees in defending this suit. Certainly not upon any promise, nor by virtue of any moral or equitable obligation. By the answer of one of the defendants, it appears that the decree was for quite an amount more than the complainants were entitled to, and for near two hundred dollars more than appears to be their due by the master's report, including the items for professional services. The complainant in this case filed his bill to set aside or open this erroneous decree which was obtained on the default of the defendant, and the defendants are allowed twenty-five dollars by the court for employing an attorney to defend an unjust and illegal decree obtained at their own instance in the absence of the defendant, who it appears was a non-resident. They first obtain a decree for five-hundred dollars, when as appears from the master's report, deducting

out the items allowed for attorney's fees, they were not entitled to quite three hundred dollars, and because they are required to employ counsel to defend a bill which seeks to expose the injustice of the decree, it is said that their counsel fees should be taxed to a person who is not a party to the record, because that person executed a mortgage to indemnify them for endorsing certain notes. We think this is asking too much of a court of equity, and the court below ought to have rejected this charge, and not permitted it to form a part of the decree.

The court erred in overruling the exceptions to the master's report so far as related to the items for professional services. So much of the decree as confirms that part of the report is reversed.

Decree reversed, in part.

J. E. Jewett, for appellant.

Casady & Tidrick, for appellees.

BABBITT *v.* WALTERS *et al.*

A demurrer under the Code should be special.

The averments in a petition or answer, under demurrer, will be regarded as true.

APPEAL *from Marion District Court.*

Opinion by GREENE, J. James M. Walters and Jessee Mounts filed their petition in equity to have a certain deed, executed by the commissioners of Marion county to Lysander W. Babbitt, set aside. To this petition Babbitt filed an

answer, to which complainant demurred, and the demurrer was sustained by the court. The defendant failing to answer further the court found complainant's petition to be true, and rendered a decree accordingly.

The facts contained in the answer are admitted to be true by complainant's demurrer. It appears by the averments in the answer, that in August, 1850, James M. Walters purchased lots six and seven in block three, in the town of Knoxville, and paid eleven dollars and seventy cents as the first installment, and was to pay the balance, forty-three dollars and thirty cents, in two equal payments, in one and two years from the tenth day of August, 1850; that said Babbitt, as agent of the board of commissioners of Marion county, executed to Walters a certificate of purchase, which stipulated "that the lots aforesaid, and all money paid thereon, and all improvements made thereon, should be forfeited and revert to the board of commissioners aforesaid, in case either of the above mentioned payments are not made when due;" that up to the twelfth day of August, 1851, the first payment, due on said lots, had not been made, and that the lots, according to agreement, were forfeited to the county; that on said twelfth day of August, said Babbitt purchased the lots and paid the appraised value to the county treasurer, as appears by his receipt, and on the same day the board of county commissioners, Miles Jordan, J. M. Brouse, and Martin Neel, executed and delivered to defendant a deed of conveyance for said lots; that the deed was duly recorded on the day following. The answer denies all fraud in procuring said deed; denies the right of the county judge, who was subsequently elected, to execute a deed, as he did, to the complainants for the same lots, and avers that it was a fraud, &c., upon his previously acquired rights.

The only cause of demurrer alleged against the answer, is in the following words: "That the said answer is not such as would bar the plaintiff's action." This is not such

a demurrer as is recognized by the Code. Section 1754 declares that, demurrers "for substantial defects must set forth the true grounds of objection to the pleading demurred to." This language clearly requires a special demurrer —a specific designation of the defect in the plea demurred to. In the present case the demurrer is as broad and general as language could make it. Instead of setting forth the true grounds of objection; instead of pointing out the substantial defects as contemplated by the Code, it makes a general sweep at the whole answer. Under such a demurrer we are at a loss to know what portion of defendant's answer was considered substantially defective. We see much in it that is responsive to the petition, and assuming the averments under the demurrer to be true, we think it shows an equitable defense to the petition, and that the court erred in the decree below.

Decree reversed.

C. Bates, for appellant.

Casady & Tidrick, for appellee.

Goods *v.* The State.

Where liquor was sold by the dram in the grocery store of defendant, by a third party, when defendant was absent from the store, the evidence should show that the grocery was kept for the purpose of selling liquor by the dram; or that it was sold by direction or approbation of defendant, in order to justify a verdict against him.

Appeal *from Polk District Court.*

Opinion by Kinney, J. Indictment for selling liquor by the dram. From the bill of exceptions it appears that

the only evidence was that given by Phillip Bizgard, who testified that sometime about the middle of March, 1852, he was at the grocery store of Goods, and that the son of Goods, or Reuben Beary, sold a glass of brandy to Josiah M. Thrift, who went out of the door and asked witness and others to go with him, and that they went and drank the liquor, and that defendant was not present. Upon this evidence the defendant was convicted.

A motion was made for a new trial, which was overruled by the court.

This evidence was not sufficient to convict the defendant, and he was entitled to, and should have obtained, a new trial. By the Code, the retail of intoxicating liquor by "the glass," or "dram," is prohibited, and it also provides that any person engaged therein, or that in any way aids or assists in such illegal traffic, whether as principal or clerk, bar-keeper or otherwise, shall be subject to the penalties therein provided. § 928.

This law was framed for the purpose of preventing all kinds of traffic in intoxicating liquors by the glass, to be drank in or about the premises where sold, and all persons engaged in such traffic, whether as principals, clerks or bar-keepers, may be indicted and punished. The statute is broad, and strikes at the very root of this pernicious traffic, and courts and juries are required to give it such construction as will prevent evasions and subterfuges. While all this is true, and while it is the duty of this court to sustain and carry out all of the valuable purposes of this law, still we are not willing to sanction a judgment rendered upon a verdict without any evidence to authorize it. If it had appeared that evidence was introduced to show that the defendant kept the grocery for the purpose of selling liquor by the glass, or that the person who sold the liquor was in his employ for that purpose, or that he sold it under his direction, or by his approbation, then there would have been some testimony to justify the verdict. It

is probable that the store was kept for a purpose entirely lawful, and that the sale of intoxicating liquor was no part of the business of Goods, the principal, and that the liquor from which the young man sold the "dram" was never intended by the defendant to be appropriated for traffic.

The prosecution should have connected Goods with the sale in some way as principal, or as having violated by his own act the law, before he should have been convicted. There cannot be any doubt, but that from the testimony the law was violated, but it is equally clear that there was no evidence against the defendant, and the court should have granted a new trial.

Judgment reversed.

Curtis Bates, for app ellant.

P. M. Casady, for the state.

JEWTET *et al. v.* MCLELLAND.

Where the suit is founded on an instrument of writing, filed with the justice, and where the signature is not denied under oath, a non-suit should not be granted for non-appearance of the plaintiff.

APPEAL *from Polk District Court.*

Opinion by GREENE, J. This suit was commenced before a justice of the peace, against the appellants, on a promissory note made by them to McClelland. Judgment was rendered against them, and they took the case to the district court by writ of error, where the judgment of the justice was affirmed. It appears by the returns of the

justice that the cause was set for trial December 26, 1851, at eight o'clock A. M.; that at half past eight, J. E. Jewett, one of the defendants, appeared, but as the plaintiff had not appeared, the justice told defendant that he would return to his office again at nine o'clock to try the cause; that he did return to his office at or before that hour, and Mr. Jewett was not there then; that ten or fifteen minutes after that, Mr. Jewett came to his office, and he then called the suit, and that Mr. Jewett then moved for a non-suit, on the ground that it was past nine o'clock. The motion was overruled. It is claimed that the district court erred in affirming this proceeding of the justice. The Code, § 2279, declares that "the parties in all cases are entitled to one hour in which to appear after the time fixed for appearance, and neither party is bound to wait longer for the other." It is also provided by the Code, § 2291: "If the plaintiff fails to appear by himself, his agent or attorney, on the return day, or at any other time fixed for the trial, the justice shall render a judgment of non-suit against him with costs, except in the case provided in the next section." The next section which establishes an exception to the above practice applies to any suit founded upon an instrument of writing purporting to have been executed by the defendants, and when the signature is not denied under oath. Hence, the justice might proceed with the case, whether the plaintiff appeared or not, as provided in § 2292. It follows, then, that the plaintiff could not in a case like the present, be legally non-suited for non-appearance, nor were the defendants required to wait longer than that hour for trial. It would have been error in the justice to have refused them a trial at the end of that hour, and if they had been in attendance during the appointed time, and had afterwards withdrawn, the justice could not take up the case and render judgment against them by default. But neither of these facts exist in the present case. If the justice had lost jurisdiction over the

defendants, as is claimed, they restored it to him again by appearing, demanding a non-suit, and submitting to a trial. We therefore can see no error or injustice in the case.

Judgment affirmed.

J. E. Jewett, for appellants.

B. Rice, for appellee.

GRANGER *v.* BUZICK.

G. and B. were made defendants to a suit, but there was no service upon B. nor judgment rendered against him. On the trial it appeared that B. was improperly made a party, but G. did not raise the objection in the court below; held that if there was error in the proceeding as to B., advantage could not be taken of it by G.

A judgment will not be reversed for errors that do not affect the party seeking to reverse.

APPEAL *from Polk District Court.*

Opinion by KINNEY, J. Suit commenced before a justice of the peace against Barlow Granger and Curtis Bates. Summons returned, "served" on Granger, and Curtis Bates "not found" in the county. A bill was filed before the justice for seventy dollars and eighty-one cents. Judgment for twenty-four dollars and ninety cents rendered against Granger, who appealed, and the cause being submitted to the court, the court found on the evidence:

1. That Barlow Granger, one of the defendants, agreed with the plaintiff to pay him the sum of forty dollars per year for the services of the plaintiff's son, and also to board and wash for the son while in the defendant's service.

2. That plaintiff's son worked for said Granger from the 26th day of July, 1849, until the 16th day of February, 1850.

3. That the plaintiff boarded his son while he was in defendant's service, worth one dollar and fifty cents per week, and also had his washing done, worth seventy-five cents per week.

Upon these facts a computation was made by the court, and a judgment rendered against Granger for the amount so found to be due.

The appellant contends that upon the evidence, the court should have rendered judgment of non-suit, and that as the contract was with Granger alone, and the suit commenced against Granger and Bates, therefore judgment could not be rightfully rendered against Granger.

There is no doubt but that Bates was improperly made a party. The contract was exclusively with Granger and Buzick, and not with Buzick, Granger and Bates. Bates was not served with process, and therefore not in court. Granger was alone liable, and if Bates had been in court, judgment could not have been entered against him. There was not any objection in the district court by the defendant Granger, to the judgment, in consequence of Bates being joined as a party defendant; neither did he make a motion for non-suit, as he should have done if he intended to avail himself of any defense on that account. He permits judgment to be rendered, and now for the first time complains because the court did not non-suit the plaintiff. We think the objection comes too late, particularly as he is not injured by the judgment, and a reversal would in no wise benefit him. It is not pretended but that he made the contract, and is liable upon it, neither is it pretended that the judgment is for too large an amount.

It has been repeatedly decided by this court that the court will not reverse in consequence of errors that do not operate injuriously upon the party seeking a reversal. But it is quite questionable whether the court erred. If

the party had declared upon a joint contract, and formed a separate contract with one of the parties on motion, it would be the duty of the court to grant a non-suit. But in this case there was not any declaration, the suit having been commenced before a justice of the peace. The bill of particulars could, it is true, to some extent, occupy the place of a declaration, but there is no bill of particulars before us. The suit is instituted against Granger and Bates, and the transcript of the justice states that a bill of particulars was filed, but whether filed against both, or Granger alone, we are not sufficiently informed. Be that as it may, it is sufficient for the court to know that the error, if any, cannot possibly prejudice the defendant, and that he cannot now in this court avail himself of a defense which he should have made, if at all, in the court below.

Judgment affirmed.

Curtis Bates, for appellant.

J. E. Jewett, for appellee.

BRECKBILL *v.* STUTYMAN.

Where a note is made payable to bearer, possession is *prima facie* evidence of ownership, without proof of indorsement, and a denial of ownership should be sustained by evidence.

APPEAL *from Polk District Court.*

Opinion by GREENE, J. Conrad Stutyman filed his petition against Mary A. Breckbill, on a promissory note executed by her to M. McCall, or bearer, for two hundred dollars. The note was indorsed by McCall, to G. Berkley; subsequently one C. D. Ranking indorsed the note to the plaintiff. Judgment, in favor of plaintiff.

In the court below, the question was raised: "Can an indorsed note, when the answer denies that the plaintiff has any property, and when objection is made to its reception as evidence, be received without proof of the indorsement?" This question was determined in the affirmative, and it is now contended that the court erred in so deciding.

As the note was made payable to bearer no proof of indorsements was necessary. Possession of such a note, without regard to indorsements, is *prima facie* evidence of ownership, and a mere denial that plaintiff has any property in the note, without proof to that effect, is not sufficient. The fact that the note was indorsed by the payee and subsequently indorsed by a holder who was not connected by previous indorsements as indorsee, cannot change the character of the note, or make it less negotiable by mere delivery than it was when it passed from the hands of the maker. The maker promised to pay the amount named in the note to M. M. or *bearer;* that promise cannot be limited or enlarged by any indorser or holder of the note. The maker's liability to pay the note to the bearer, unless it appears that he is not the owner, cannot be impaired by any defect or broken link in the chain of indorsement.

It is true, as claimed by counsel for appellant, that a valid transfer can only be made by the person who is legally interested in the note; but it is equally true, *prima facie*, that the holder of the note payable to bearer is the person who is legally interested, and who has the right to transfer the same, either by delivery or by indorsement. In either case possession of a note is sufficient *prima facie* proof of the transfer. This question has been already decided by this court.

Judgment affirmed.

C. Bates, for appellant.

J. E. Jewett, for appellee.

Houston v. Tremble.

Upon a trial of a question of fact, under the Code, the written decision need not state the evidence upon which the facts were decided; nor need the facts as found be given in writing, unless requested by one of the parties.

Appeal *from Marion District Court.*

Opinion by Kinney, J. Bill filed for specific performance. Answer alleges that the agreement to convey was entered into by fraud and duress, &c. Decree ordered a conveyance of the land described in the agreement.

It is claimed that the court erred by neglecting to state, in writing, the facts on which the decree is rendered. The Code provides that upon a trial of a question of fact, its decision, if requested by either party, shall be given in writing, stating the facts found, and the conclusions founded thereon, separately; all of which shall be entered upon the record. § 1793.

In this case the court states all the facts upon which the decree is based, and proceeds to state that there was some evidence introduced by the defendant tending to show that he signed said agreement through fear; but not sufficient to enable him to avoid his contract. We think the court has complied, in this case, with the requirements of the above section. It stated the facts found to exist, but does not embody all the evidence in relation to the duress. It certainly never was intended by the framers of the Code that the court should set out all the evidence in the case. This would require an amount of labor which we think the legislature never intended to impose upon the court. If the parties desire that all the testimony should come up to the supreme court, they can have it put into a bill of exceptions, or if in chancery cases, it is in the form of depositions,

they should be sent up, and the whole facts will be before the court. It will be observed that the Code only requires the court to state the facts found, and the conclusions founded thereon, at the request of either party. The court is not obliged to state the facts unless requested. In order to justify this court in reversing a case, on the ground that the provisions had not been complied with, it should appear upon the record that the party requested the court to set out, in writing, the facts found, and the conclusions founded thereon; then, if the court refused the request, it would be error sufficient to reverse the judgment. In this case it does not appear that either party requested the court to state the facts found; and hence the party could not complain if the facts had not been reduced to writing at all by the court.

Judgment affirmed.

Casady & Tidrick, for appellants.

H. B. Hendershott, for appellee.

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WINCHESTER *et al. v.* COX *et al.*

Where the Code provides that a copy of notice may be left at defendant's usual place of residence, it is not sufficient to leave the copy with a clerk at the store of defendant. But such defect is cured by appearance.

Where a party appears in a case, it is an appearance to the notice as well as to the writ of attachment.

APPEAL *from Polk District Court.*

Opinion by GREENE, J. Cox and Shelley sued Winchester and Cole to secure the payment of a promissory note.

It appears that notice of the suit was regularly served upon Winchester, by leaving a certified copy at his dwelling, but the service upon Cole was "by delivering a certified copy of the same at the store of L. D. Winchester & Co., with David Ayers, he being over fourteen years of age, and being clerk for said Winchester & Cole, informing him of the contents of the same."

The Code, § 1721, provides that, "the service is to be made by reading the notice to defendant, and giving him a copy, if demanded. If not found, he may be served by a copy left at his usual place of residence with some member of the family, more than fourteen years of age." In this case the service was neither upon the defendant, nor yet at his usual place of residence. A store can hardly be regarded as the usual residence of a party, and if it is his usual residence, his only home, the officer's return should state the fact. Judgment was rendered against Cole as well as Winchester, and he now seeks to reverse it, on the ground of defective service; and the judgment, as to Cole, would be reversed if the record in the case did not sufficiently show a general appearance of both parties by their attorneys. The transcript states that defendants, by counsel, came and filed a motion to dismiss the attachment. It also states that the "*cause* came on to be heard, on motion filed by defendants to dismiss the attachment, and was argued by counsel," &c. It states, too, that "the cause then came on to be heard on the merits, and was submitted to the court, and after examining all the evidence," &c. These statements from the record sufficiently establish a *general* appearance. If it had been Cole's intention to appear only to the attachment branch of the suit, and not to the case itself, he might have had such special appearance entered of record. But there is no such reservation in the entries. Counsel appear generally for both defendants. When the cause came on to be heard arguments were made to the motion, and evidence submitted on the

merits; and there is nothing to show that defendant's attorney at any time withdrew from the cause.

Where a party appears to a cause it is an appearance to the notice or summons, as well as to the writ of attachment. This point was settled in *Graves* v. *Cole*, 2 G. Greene, 467.

We conclude, then, that the court below did not err in rendering judgment againt Cole.

Judgment affirmed.

C. Bates, for appellants.

Casady & Tidrick, for appellees.

JEWETT *v.* LYON *et al.*

Where a promissory note was given for a certain quantity of land, and stipulated that if the quantity did not hold out, that a corresponding deduction should be made from the amount of the note; held that the *onus* was upon defendant to show that the land did not contain the stipulated quantity.

APPEAL *from Polk District Court.*

Opinion by KINNEY, J. Lyon & Allen filed a petition against Jewett, and set forth the following, as a copy of the note sued on:

"$75,000.—Twelve months from date, I promise to pay Hiram Nutting, or order, seventy-five dollars, for value received, May 4th, 1850.

"The above note is given in part payment of a piece of land, this day purchased of said Nutting, deeded to him by Anson Balding, and to said Balding by Edwin Hall and

wife, and Edward Hall and wife. containing three and a half acres. Now if said land shall hold out three acres and a half, when surveyed, then the above note is to be paid in full, if not then I am to pay in the proportion that one hundred dollars bears to three acres and a half.

"J. E. JEWETT."

Upon the back of this note was an assignment by the payee to Lyon & Allen.

The cause was submitted to the court by the parties, the plaintiff introducing the contract as the only evidence, whereupon the defendant moved for a non-suit for want of evidence to sustain the petition, which the court overruled, and rendered judgment in favor of the plaintiff for the amount due on the note. To this the defendant excepted, and assigns the decision of the court overruling the motion for error.

It is urged upon the part of the defendant in error that it was incumbent upon the plaintiffs to prove that the piece of land for which the note was given, contained three acres and a half in order to entitle them to recover the face of the note, and having failed to do this, that the court should have non-suited them. We do not think from a reasonable construction of the contract, that it was necessary for the plaintiff's to do any thing more than introduce their note. The burden of proof was then upon the defendant, and if he could show that by a survey of the land it did not hold out, the amount specified in the note would be proportionably reduced. This he did not attempt to do; did not even file a demurrer, or any other plea to the petition, or offer any defense whatever. By his agreement he promises to pay a specified amount on a day, certain. This amount by the condition attached, may be reduced in the event that the piece of land does not contain as much as the parties supposed it did. This permission was no doubt intended for the benefit of the payor, but it could only be made available

by showing on the trial that the piece of land purchased was less than three acres and a half. The condition attached to the note secures to him this advantage, and by his neglecting to interpose any defense by way of plea, or evidence, it is not unreasonable to presume that he obtained the number of acres specified in the agreement.

The obligation to pay is in all respects a promissory note, and the stipulations attached to it do not change in any respect its character, or weaken the liability of the maker. It only provides for a certain contingency, the *onus* to establish which are upon the defendant. Upon the introduction of this note in evidence, the plaintiffs made out a *prima facie* case, and in the absence of any rebutting testimony on the part of the defendant, the plaintiff's were entitled to recover, and hence the court did not err in overruling the motion for a non-suit.

Judgment affirmed.

J. E. Jewett, for appellant.

W. W. Williamson, for appellee.

HALL *v.* PERRY.

Parole proof admissible to show that the consideration money named in a deed had not been paid, and to show that the deed did not name the true amount. Such proof should be strong and positive.

APPEAL *from Polk District Court.*

Opinion by GREENE, J. This suit was commenced by E. Hall, in the Polk county court, against J. M. Perry, as administrator of the estate of John Norley, on a book account. Plaintiff having recovered judgment for less than

he claimed, took an appeal to the district court, where judgment was rendered in favor of defendant.

On the trial it appeared that the plaintiff had, among other items, sued for the purchase money of two tracts of land, and introduced the deeds to show the sale. The deeds recited that the purchase money had been paid, and plaintiff called witnesses to prove that it had not been paid, and was different from that set out in the deed. To this proof defendant's counsel objected, and the objection was sustained by the court.

The principle is now well established that the true consideration for which a deed was given may be shown by parole proof, although it should vary the consideration named in the deed. But in such case the proof should be strong and positive. Such proof may, with equal propriety, be admitted to show that the purchase money or price agreed upon for the land had not been paid, or was not paid at the time the deed was executed and delivered. As this rule has been entertained by this court in former decisions, it is not necessary to enlarge upon it here. We conclude in the present case, that the court erred in refusing the testimony proposed.

Judgment reversed.

W. W. Williamson and *J. E. Jewett*, for appellant.

C. Bates and *J. M. Perry*, for appellee.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

IOWA CITY, NOVEMBER TERM, 1852.

In the sixth year of the State.

PRESENT:

HON. JOSEPH WILLIAMS, CHIEF JUSTICE.
" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

HUNT *et al. v.* CARR.

Parole evidence admissable to show that the defendant was induced to sign the contract under the fraudulent misrepresentations of plaintiff.

APPEAL *from Muscatine District Court.*

Opinion by WILLIAMS, C. J. James Carr, the plaintiff below, instituted his action on the case against G. W. Hunt, surviving partner, &c., to recover damages which he alleged he had sustained by the default of the defendants, who, as common carriers, had undertaken, upon contract, to convey merchandise for him from Muscatine, on the

Mississippi river to the town of Sigourney, in Keokuk county, in this state. The following evidence of the contract is made part of the record:

"Received in good order of John Lemp, six boxes of merchandise, &c., weight 10,885 lbs., which we agree to deliver in like good order to James Carr, in Sigourney, Keokuk county, Iowa, said Carr paying freight for the same at the rate of seventy cents per hundred pounds.

"Signed, G. W. & J. HUNT."

The allegation in the plaintiffs' complaint is that during the time that the merchandise was in the possession of the defendants, as common carriers, on its transit from Muscatine to Sigourney, it was by their negligence so injured, as that he has suffered damages to the amount of one thousand dollars. The defendant answered the declaration by the plea of "not guilty." The cause was submitted by the parties to the court without requiring a jury. On the trial, as appears by the bill of exceptions, the defendant offered evidence to prove the representations of Carr, the plaintiff, as made by him at the time of the making of the contract, "in regard to the roads, and the distance from Muscatine to Sigourney." To this evidence plaintiff's counsel objected, and the objection was sustained by the court. The counsel for the defendant then stated to the court, that the above question was one of a series of questions, intended to be put to each, and all of the witnesses, with a view to prove that the plaintiff obtained the signature of the defendant to the contract by fraud in this; that he misrepresented the distance from Muscatine to Sigourney; that he misrepresented the state and condition of roads. The defendant also offered to introduce testimony tending to prove that plaintiff had then lately traveled the road from Muscatine to Sigourney; and that the defendants or either of them had never traveled that road;

but for truth in regard to all these matters they relied entirely on the statements of the plaintiff. The court refused to admit the evidence. To this decision of the court the counsel for the defendant excepted. Judgment was rendered in favor of the plaintiff for the sum of two hundred and twenty-four dollars and eighty cents damages. From this judgment the defendant appealed to this court.

The only question for decision here is as to the ruling of the court below in refusing to admit the evidence as offered to prove fraud and misrepresentation on the part of the plaintiff in the making of the contract.

The position in law upon which the counsel for the plaintiff rely, "that parole evidence cannot be received to vary or contradict the terms of a written instrument of contract, this action being upon a special contract," does not affect the question raised by the assignment of error. It is true, that as a general rule of law, a written instrument cannot be varied or contradicted, in its terms, by parole evidence. It is well settled, that parole evidence is admissable to show mistake or fraud in the making of a written instrument of contract.

The bill of exceptions shows that the counsel for defendant offered to prove that the defendants were induced to make and execute the receipt for the goods, and according to its terms, undertake to deliver them to plaintiff, for the price stipulated, at Sigourney, by the fraudulent misrepresentation of plaintiff as to the distance from Muscatine to that place, and the condition of the roads; he being well acquainted with the road, and having lately traveled it, and that the defendants had never traveled that road, but relied on representations of plaintiff. The defendants offered this evidence with the design to defend the action of the plaintiff, by showing that the damages complained of were the result of causes over which defendant could exercise no control; that if plaintiff had represented the distance and the condition of the roads truly defendants

would not have made and executed the contract; and that they were induced to execute the contract by the fraud and misrepresentations of the plaintiff.

We are of the opinion that this evidence, as offered by the defendant, should have been given to the jury; that the court erred in rejecting it. It is well established by the courts that fraud and misrepresentation in the making and execution of a contract, is a good defense to an action at law upon it, where such fraud and misrepresentation, relating to facts material to the interests of the party to the contract, and particularly where such party confides in the other for truthful information, as to the facts upon which the contract depends.

Such we understand to be the proposition of the defendant in the evidence offered in this case. The court should have permitted the evidence to go to the jury under the issue as joined in the case.

Judgment reversed.

S. Whicher and *W. G. Woodward*, for appellants.

Henry O'Conner, for appellees.

HETFIELD *v.* TOWSLEY *et al.*

An officer not liable in trespass for the erroneous exercise of official acts, if he did not exceed his authority or act corruptly.

APPEAL *from Muscatine District Court.*

Opinion by KINNEY, J. Plaintiff sued Towsley and others in an action of trespass, for taking and driving away one yok eof oxen. To this, Towsley pleads the general

issue, and also a special plea, stating that at the time of the alleged trespass he was acting as justice of the peace, and that a suit was brought before him by Litterell against Hetfield, upon a note, upon which an attachment was issued, and the oxen, which are alleged to have been taken by defendant, were attached. The proceedings before him as justice are also set out in his plea; final judgment having been rendered against the said Hetfield. And the defendant says that all he had to do with the supposed trespass was done in his official capacity, and that if he committed any error, the same was an error in judgment only, for which he is not responsible as a trespasser. Jeans files his special plea, stating that he was acting as constable, and took the oxen as such by virtue of process, &c.

To these pleas the plaintiff demurred, but the court overruled the demurrer, and the plaintiff, abiding by his demurrer, appealed to this court, and assigns the decision for error.

We see no objection to the ruling of the court. The pleas were a good defense to the action. The justice and constable in what they did, were in the performance of official duty. Unless they exceeded their jurisdiction, or acted corruptly, or without authority of law, they are not liable. Although the justice might have acted erroneously, still he was not liable as a trespasser. The injured party had his remedy by *certiorari* or appeal. The demurrers admit the official character of the officers, and also that they acted in good faith, as stated by them in their special pleas.

Judgment affirmed.

S Whicher, for appellant.

W. G. Woodward and *J. S Richman*, for appellee.

Talbot *v.* De Forest.

A chattel mortgage invests the morgagee with the title to the property which can only be defeated by a compliance with the conditions of the mortgage. Upon a final failure to comply with those conditions the mortgagee becomes absolute owner.

An action of replevin of personal property cannot be maintained by a mortgager against the sheriff, when the property was levied by direction of the mortgagee upon an execution against both him and the mortgager.

Appeal *from Johnson District Court.*

Opinion by Greene, J. Replevin by Talbot against DeForest, as sheriff of Johnson county, commenced before a justice of the peace, for a horse and wagon. The defendant recovered judgment before the justice of the peace, and also on appeal in the district court.

The following facts are disclosed by the bill of exceptions: In July, 1852, Talbot executed to Geo. Andrews, a chattel mortgage, including among other things the horse and wagon in question. The mortgage sale was to be rendered void upon condition that Talbot should pay certain accounts and claims specified in the instrument, including a note of hand to Dr. Morsman, due August 1, 1851, and signed by Andrews as security. Before that note became due, Andrews purchased unconditionally of Talbot, all the property named in the mortgage, except the horse and wagon, with the understanding that they were to remain under mortgage, subject to the payment of said note. Talbot having failed to pay the note, judgment was recovered against him and Andrews for the amount. Subsequently, DeForest, as sheriff, levied an execution in favor of the state of Iowa against said Talbot and Andrews, on said horse and wagon, as the property of Geo. Andrews, and by his direction. This property at the time of the levy, was in Talbot's possession, and had been from the date of the mortgage.

Upon these facts, it is urged that there was error in the

decision of the court below. Many abstract propositions of law are urged by appellant's counsel in support of his views, but we cannot regard them as applicable to the facts before us. The only legal point to be decided is, was the sheriff justified in taking the property by virtue of the execution against Talbot and Andrews. In this, we think the sheriff was justified for two reasons.

1. The title to the horse and wagon was in Andrews, by virtue of the mortgage to him from Talbot. Andrews' rights in the property were subject to be defeated by Talbot's compliance with the conditions of the mortgage, but the facts in the case show that Talbot had failed in that particular, and upon such failure, Andrews became the absolute owner.

That personal property is vested in the mortgager under such circumstances, is fully shown by the authorities. *Melody* v. *Chandler*, 3 Fairf., 282; *Montgomery* v. *Kerr*, 1 Hill S. C. 291; *Hopkins* v. *Thompson*, 2 Port., 433; 7 Cowen, 290; 1 Pick., 389; 6 Gil. and John., 72; 3 Gil., 455; 6 Pick., 610; 8 John., 96; 4 Kent Com., 138; Story on B., 197. In New York and other states, the doctrine prevails that the mortgagee of personal property, upon the failure of the mortgager to perform the conditions of the mortgage, acquires an absolute title to the property. 9 Wend., 80; 2 Denio, 172; 6 Shep., 357; 2 Greene, 8. At least the legal right to the property in question was *prima facie* in Andrews, and he had a right to assume possession by pointing it out to the officer as his property. Nor could the mortgagor dispute the right of mortgagee. 3 Dev., 98 4 Blackf., 425; 13 Shep., 499.

2. But the execution in this case was as much against Talbot as Andrews, and hence if T. had any right in the chattels, the sheriff was justified in appropriating that right in satisfaction of the execution. As there appears to have been no other claimants to the property, and as the execution was equally against the mortgager as well as the mort-

gagee, we cannot discover the slightest foundation for the action of replevin against the sheriff.

Judgment affirmed.

Jas. Harlan, for appellant.

Wm. Penn Clark, for appellee.

HUMPHREYS *v.* DARLINGTON.

Unless the contrary appears of record, it will be presumed that the decree was authorized by the evidence.

If defendant makes default, a decree *pro confesso* may be rendered against him without evidence in support of the bill.

APPEAL *from Muscatine District Court.*

Opinion by KINNEY, J. Bill filed by Darlington. Rule taken on the defendant to plead, answer or demur in ninety days, and cause continued. Defendant did not appear, and cause was continued from time to time. Decree at last, by default, and defendant ordered to make to complainant a deed to certain lands, described in the bill; or in default, that the decree operate as such conveyance.

Defendant appeals, and contends that the cause should have been set down for trial, that the allegations of the bill should have been established by proof, before decree rendered, and that the record should have shown that there was a hearing, &c. This court will presume, unless the contrary appears, that the court had all the necessary testimony to authorize the decree. But in this case no such presumption is necessary. Rev. Stat., 108, § 13, provides, that if the defendant shall not file his plea, answer or

demurrer, within the time limited, as aforesaid, the said court may at their discretion render a decree thereon, or order the complainant to prove the allegations of his bill; and such decree may then be made as the court shall think fit. If it appeared affirmatively upon the record that the court rendered a decree upon the merits of the bill without proof, this court would not reverse. The proper course for the defendant was, if he had a meritorious defense, to move to set aside the default and open up the decree. The practice of compelling an appearance, which prevails in England, has never been adopted in this country. Upon proof of service, if the defendant makes default, a decree *pro confesso* may be rendered, without complainant's establishing by proof the allegations in the bill.

Decree affirmed.

S. Whicher, for appellant.

W. G. Woodward, for appellee.

STILES *v.* BROWN.

Objections to a petition, where the court has jurisdiction, are waived by going to trial on the issues joined, without reserving exceptions.

It is error to render judgment for a greater amount than is claimed by the petition.

APPEAL *from Linn District Court.*

Opinion by GREENE, J. The petition in this case was filed by Horace N. Brown, against Wm. Stiles, for criminal conversation. Plea, general issue. Verdict and judgment against defendant for $5,000.

1. It is objected that the court erred in overruling the demurrer to the petition. But as defendant joined issue upon the averments in the petition, without exception to the ruling of the court upon the demurrer; and as the objections raised under the demurrer were not such as showed a want of jurisdiction, we must regard them as waived by going to trial upon the merits.

2. The petition concludes as follows: "Said Stiles has property in said county, and rights and credits that may be attached to the amount of about seven hundred dollars; the said plaintiff therefore asks a judgment for that amount with interest and costs." But judgment was rendered for the sum of five thousand dollars, and as the petition set up a claim of five thousand dollars in the first sentence it is urged that the judgment is warranted by the petition. Although the petition contains an averment of damages to the amount of $5,000, still it is equally explicit that plaintiff asks judgment for only $700. A petitioner should receive no more than is asked in his prayer for judgment. The court was not authorized to render judgment for a greater amount than is claimed in the pleadings; nor can a defendant be regarded as in court, or subject to its jurisdiction, for a greater amount than the petition designates. The judgment is therefore reversed, and a judgment may be rendered in this court, in favor of appellee, for the sum of seven hundred dollars with interest from the date of verdict.

Judgment reversed.

Wm. Smyth, for appellant.

N. W. Isbell, for appellee.

McCormack *v.* Reece.

A subscription paper for improvements in a street, will hold the parties to it, as to a promissory note, and where the payee indorsed the paper over in part payment for the improvement, he will be held as indorser, and as guarantor of the genuineness of the signatures.

Where a subscription paper "promises to pay as the work progresses," proof that the work was not finished, not admissible.

It will be presumed that the judgment was justified by the evidence.

Appeal *from Muscatine District Court.*

Opinion by Greene, J. This was an action of assumpsit on a subscription paper to pay for certain improvements in Muscatine. The subscribers promised payment to Wm. McCormack or order. McCormack assigned the paper "to the bearer," and the suit was commenced before a justice of the peace, by Henry Reece, the bearer, against McCormack, the indorser, for twenty dollars, the sum placed to the name of Geo. Hunt, who did not subscribe or authorize his name to the paper. Plaintiff recovered before the justice and also in the district court.

1. It appeared on the trial that the subscription was assigned to Reece, in part payment for the improvement. In the instructions to the jury, the court regarded the subscription as a promissory note, and McCormack as indorser, and as guarantor of the genuineness of the signatures. To these instructions exceptions were taken, but we can see in them no serious error. It cannot be questioned, that all who subscribed to the instrument an amount stated by them, became liable to pay that amount according to the stipulations of the subscription paper; nor can it be questioned that the improvement contemplated by the paper was a sufficient consideration to make the promise binding. As McCormack indorsed the paper to Reece, in part payment of the improvement for which the promises were made, it follows that he was not only liable as indorser, but also as guarantor of the genuineness of the paper.

2. But the bill of exceptions shows that the defendant offered to prove that the work contemplated by the paper was not finished, nor sufficiently well done, and the court sustained the objection to the introduction of this testimony. Was this ruling erroneous? We think not. The paper stipulated the "promise to pay as the work progresses." The indorsee was therefore entitled to payment before the work was finished or well done.

3. It is objected that the testimony did not show sufficient consideration for the indorsement, nor sufficient to justify the judgment against the indorser. To this it may be replied that the record does not purport to give all the testimony. It must therefore be presumed that the judgment was justified by the evidence.

Judgment affirmed.

S. Whicher, for appellant.

J. Scott Richman, for appellee.

CASES

IN

Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF IOWA,

DUBUQUE, FEBRUARY TERM, 1852.

In the sixth year of the State.

PRESENT:

HON. JOSEPH WILLIAMS, CHIEF JUSTICE.
" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

LATOURETTE *v.* COOK.

The statute of limitations cannot be pleaded to an action of debt on a judgment from another state.

APLEAL *from the District Court of Dubuque County.*

Opinion by KINNEY, J. This was an action of debt brought on the 20th of September, 1850, in the district court of Dubuque county, by *Latourette* v. *Cook*, on a judgment of the inferior court of common pleas of the county of Essex, state of New Jersey, for $192 rendered in favor of said Latourette, against said Cook, on the 11th of

April, 1837. The declaration is in the usual form, to which is annexed a transcript of the record of the court, certified according to the act of congress. The defendant pleaded five pleas. The fourth plea is the plea of the statute of limitation. Plaintiff demurred, defendant joined. The court overruled the demurrer, and gave judgment for the defendant. The only question before the court is, is the plea a good plea to an action of debt founded upon a judgment? This depends very much upon the construction of the statute. Rev. Stat., 385, § 4, is as follows: "That every action of debt or covenant for rent, or arrearages of rent, founded upon any lease, under lease, or every action of debt on account, founded upon any single or penal bill, promissory note, or writing obligatory, for the direct payment of money, or delivery of property, or the performance of covenants, or upon any award under the hands and seals of arbitrators for the payment of money only, and every action of assumpsit, shall be commenced within six years after the cause of such action shall have accrued, and not after." In this specification it will be observed that judgments are not included. Are they embraced under the head of "debt on account?" Clearly not. Hence the action on a judgment is not founded upon a single or penal bill, promissory note, or writing obligatory for the payment of money. True, there is an obligation to pay a judgment, but it is not such an obligation, undertaking or promise, as is contemplated by the statute. The statute applies to actions of debt founded upon contracts in fact, as distinguished from those arising by construction of law.

We are aware that there have been conflicting decisions upon similar statutes, as in the case of *Hubbell* v. *Condrey*, 5 John. R., 132, and *Bissell* v. *Hall*, 11 ib., 168; but it will be found that in the case of *Pease* v. *Howard*, 14 John., 479, and *Thomas* v. *Robinson*, 3 Wend., 267, the supreme court of New York inclined to a different doctrine than the one in 5 John. But in the supreme court of

Pennsylvania, Mr. Justice Duncan, who gave the opinion of the court, after reviewing the authorities, came to the conclusion that actions on foreign judgments were not within the limitation. He cites Angel on Limitation, 170; *Richard* v. *Polyreen*, 13 Serg. and R., 393. See, also, 8 N. H., 54.

But it may be said that this is a foreign judgment, and an action upon it should be subject to the same defense as any other specialty. Suppose it is a foreign judgment, and suppose the merits were examinable in the district court—which we do not admit—does it follow that the statute of limitation can be pleaded to it? It is a judgment, and the plaintiff sues upon it as such, and annexes a copy of the record to his declaration, but there is no provision in the statute for the plea to an action of debt *upon a judgment*. The statute has expressly declared, that the plea is only allowable in an action of debt on account, or single or penal bill, promissory note, or writing obligatory for the direct payment of money, delivery of property, performance of covenants, &c. It is only by virtue of a statute that this plea of the statute of limitation can be made, and it can only apply to the particular cases enumerated. As an action upon a judgment does not fall within any of the specifications, the plea was no defense. If the language of the statute had been, all actions of debt, without stating upon what such actions of debt must be founded, then the plea would have been good to an action of debt upon a judgment. But as it set out the kind of actions, and upon what founded, the statute must be confined to the limits prescribed by the legislature.

The court erred, and the judgment is reversed, and a trial *de novo* awarded.

Smith and *McKinley*, for appellant.

L. A. Thomas, for appellee.

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Heichew *v.* Hamilton.

Technical forms of action and of pleading are abolished by the Code.

A petition under the Code is good if it shows a substantial cause of action, by a fair and natural construction of the language in which the facts are stated.

Where a party, in selling land for a tavern stand, stipulated that he would discontinue his tavern within half a mile of the land sold, as an inducement to the purchaser, upon which he bought the land and erected tavern buildings; held that such a contract is valid, and not an illegal restraint upon trade.

Appeal *from Dubuque District Court.*

Opinion by Greene, J. This action was commenced under the Code by William Heichew against Jacob Hamilton. The petition sets up a claim of damages against the defendant for keeping a tavern, contrary to an agreement, by which plaintiff was induced to purchase land from defendant. The petition charges, among other things, that the tract of land so purchased consisted of about thirty-two acres; that at the time of the purchase the defendant kept a tavern half a mile from the land, and had been in the habit of entertaining travelers; that, as an inducement for the plaintiff to purchase the land, the defendant represented to him that tavern keeping was a good business, that the site was a favorable one, that as soon as plaintiff should get ready to entertain travelers, he, the defendant, would quit tavern keeping; and that in consideration of the premises the plaintiff purchased the land, with the express understanding and agreement that defendant should quit the business, as aforesaid. The petition also charges that the plaintiff, immediately after purchasing the land, constructed and finished a suitable tavern house and out buildings, and made other expensive preparations for tavern keeping; that after he was thus prepared for the business,

the defendant, although often requested to desist, still continued to keep and entertain travelers, and thereby diverted a large portion of the custom from plaintiff's tavern. The petition claimed damages, and prayed for relief in due form.

Defendant demurred to this petition, on the ground that it does not set forth a case which entitles plaintiff to relief. This demurrer was sustained by the court.

There were two causes of demurrer assigned on which the court below acted, and to which our attention is now directed, as reasons for reversing the decision: 1st. That the petition sets forth no agreement on the part of defendant to refrain from keeping tavern. 2d. That if there is an agreement set forth, it is one in restraint of trade, and therefore illegal.

First. It is contended that the court below erred in deciding that the petition set forth no agreement that the defendant would refrain from keeping tavern. In reference to the agreement, the petition contains the following words: "Your petitioner purchased the said lands with the express understanding and agreement that the said Jacob Hamilton should quit, as aforesaid." This language, in connection with what precedes, sufficiently avers an agreement, on the part of the defendant, to quit the tavern keeping business. Under the Code, §§ 1734, 1736, it is only required that the petition show a substantial cause of action, by a fair and natural construction of the language in which the facts are stated, upon which the action is founded. By section 1733, all technical forms of actions and of pleadings are abolished. It is clear, then, that the first cause of demurrer assigned, should not be maintained under the demurrer.

Second. Upon the second point the question is presented, was the agreement set forth in the petition such a restraint upon trade as to make it illegal? The petition shows that the two taverns are in the same township, on

the same road, and within half a mile of each other. It is sufficiently shown that the agreement applied to the particular tavern which Hamilton was keeping, at the time of the sale, and near the land sold. It was then an agreement to discontinue tavern keeping at a point designated, and upon the strength of this agreement, Heichew was induced to purchase the land from Hamilton, and erect suitable buildings for that business. An agreement like this can hardly be considered an illegal business. Contracts which have a restraint upon trade in general, are not authorized by law, because they have a tendency to monopolies which are highly injurious to the public. But it is generally considered by the courts that an agreement to restrain trade in a particular place may be good.

In England the doctrine is well settled that a bond or promise, on good consideration, not to exercise a trade for a limited time at a particular place, or within a particular parish, is good. But if the restraint is general, extending throughout the kingdom, it is bad, because it operates too great a restraint upon trade, and is oppressive to one party without being of benefit to either. 1 P. Wms., 184; 2 Saund., 156, note 1; 7 Mod., 230; 10 ib., 27, 85, 130; 2 Ld. Raym., 1456; 5 T. R., 118.

In *Perce* v. *Fuller*, 8 Mass., 223, where A., in consideration of one dollar, agreed not to run a stage on a specified road under a penalty of two hundred and ninety dollars, the agreement was held to be valid.

Perce v. *Woodward*, 6 Pick., 206, bears striking analogy to the case at bar. The plaintiff purchased from the defendant a grocery store, for a sum stated in the deed, and the defendant agreed verbally not to carry on the same business within a certain distance: it was held that as plaintiff was thereby induced to make the purchase, the consideration for the agreement was sufficient, and that as the instruction was confined within small limits, it was not against

the policy of the law. See, also, *Nobles* v. *Bates*, 7 Cow., 307; *Perkins* v. *Lyman*, 9 Mass., 522; *Pyke* v. *Thomas*, 4 Bibb., 486; 1 Story's Com. Eq., 289, 290; Powell on Con., 102. The petition in the present case shows that the promised forbearance to keep tavern, induced the plaintiff to purchase the land, and the restriction was within a small limit, and consequently was not against legal policy. We think, therefore, that the demurrer should have been overruled.

Judgment reversed.

Smith & McKinley, for plaintiff in error.

Clark & Bissell, for defendant.

GOODENOW *v.* SNYDER.

Where the property of G. has been taken and converted by S., G. may waive the tort and sue in assumpsit.

Where the gold dust of G. was sent to him in charge of R., and where it was subsequently mixed and taken by force from R. and delivered to S., and by S. converted into money; held that G. could recover from S. in assumpsit.

Spanish law as to mixture of gold dust prevails in California.

The decision of a selt-constituted tribunal not valid, and should not be respected by judicial tribunals, where coercion has been used.

APPEAL *from Jackson District Court.*

Opinion by GREENE, J. This was an action of assumpsit by John E. Goodenow against Alfred Snyder. We learn the nature of the suit from the bill of exceptions. It appears that one Cogswell, who went to California on means furnished by Goodenow, delivered to one Reynolds, in

California, one hundred dollars in quicksilver gold dust for Goodenow; that the gold dust was put in a purse belonging to Reynolds, which also contained some wet-diggings gold dust. That Cogswell said to Reynolds, that he might sell the dust in New Orleans, and have all it would bring, over the one hundred dollars; that while on the Pacific, homeward bound, Reynolds and Snyder, by agreement, submitted a dispute between them to a court and jury on the ship; that the jury thus constituted returned a verdict that Reynolds had stolen some gold dust from Snyder; that by order of the court, the purse, containing the gold dust sent by Cogswell for Goodenow, was taken from Reynold's pocket by force, and given to Snyder, although Reynolds gave notice that one hundred dollars of the gold was sent to Goodenow; that Snyder said at the time, that the gold did not look like that which he had lost, but that it was "all as well," as Reynolds might have changed it, and if Reynolds would prove that the dust had been sent by Cogswell, he would return it; that Snyder sold the dust, and paid the money out for his passage; and that there was a difference between quicksilver dust and that from wet-diggings.

Upon the foregoing state of facts, as shown by the evidence, the plaintiff asked the court to instruct the jury that if they believed that Cogswell gave the dust to Reynolds to bring to Goodenow, and that if he said at the time that Reynolds might sell the same in New Orleans, and have the overplus above one hundred dollars, and that the dust was taken from Reynolds and converted by the defendant to his use, that the plaintiff might recover. That the subsequent mixing of the dust with his own would not destroy the right of Goodenow. This instruction was refused by the court. The jury returned a verdict for the defendant.

1. The plaintiff now contends that the court erred in refusing this instruction to the jury. This question involves

the plaintiff's legal right to recover. In a case like the present, where the property of one has been taken and converted by another, it is obvious that the plaintiff may waive the tort and sue in assumpsit. *Clark* v. *Shee*, 1 Cow., 197; *Taylor* v. *Plummer*, 3 Maul. and Sel., 561; Story's Agency, § 439.

So far then as the plaintiff's rights are concerned we think he has a remedy in this form of action, and that the court below erred in refusing the instruction asked by him. The fact that the gold dust was put into a bag in which Reynolds had other dust could not change the rights of Goodenow. It appears, by the evidence, that there was a difference between the quicksilver dust, which was sent for Goodenow, and the wet diggings dust which was in the bag before; consequently Goodenow's portion could have been separated from the other.

Besides, there appears to be no difference in the price, per ounce, of the two kinds of dust. Cogswell deposited with Reynolds a certain number of ounces, amounting, at California price, to one hundred dollars; therefore Goodenow's portion could have been taken from the bag by weight, without impairing or changing the value of that portion which was first put into the bag. Hence, by weight also, the dust was susceptible of separation.

Again, it appears that the Spanish laws, in relation to gold mines and mining, still prevail as customs among the gold hunters of California. By these laws the *mixtion* of gold dust is defined, and we learn from them that mixtion does not destroy the individual ownership, whether the mixing is done by accident or design. If inseparably mixed, each owner will be interested *pro tanto*. 5 Am. State Papers, 238, 240.

But in this case, as we have seen, the evidence tends strongly to prove that the gold dust was distinguishable, or it might at least have been separated by weight, and hence we conclude that Goodenow's rights were not impaired by

the mixture, and such should have been the instruction of the court below to the jury.

It is urged, however, that as Reynolds had the privilege of selling the dust at New Orleans, and of keeping all he could get over one hundred dollars, that their relation of bailee and bailor no longer subsisted, and that Reynolds became the debtor of Goodenow. But how could this result follow from the mere right conferred upon Reynolds to sell the dust? Where an agent or factor is authorized to sell goods for another, as clerk, or on commission, or for all he could get over a stipulated price, it would be preposterous to say that he could thus be made a debtor for the price of the goods sold to responsible parties. Such an arrangement, however, would just as readily change the relation of principal and factor into that of creditor and debtor, as would the authority given to Reynolds to sell the gold dust, convert his liability from a mere bailee to that of debtor. Under the arrangement with Cogswell, Reynolds could either sell the gold dust or not, at his option. If he sold he was to deliver Goodenow one hundred dollars, as the proceeds; if he did not sell, he was obliged to deliver to him the gold dust itself. He might be regarded as a mere mandatory bailee, as he engaged to deliver the dust without reward, and was only to have a certain surplus in case he sold it at New Orleans.

We conclude, then, in the language of the first assignment of errors, that the court below erred in refusing to give the jury the instruction asked for by plaintiff's counsel.

2. The only other assignment to be considered is, that the court erred in charging the jury. In relation to the trial on board of the ship, on the Pacific Ocean, the court charged as follows: "If there was a dispute between Snyder and Reynolds, and they agreed to submit the dispute to a judge and jury selected by them, or approved by them, I am of the opinion that as between them, the judgment of that tribunal is final, and I think it the duty of both courts

and jurors, in this country, to require a strong case, to induce them to disturb the decision of a self-constituted tribunal." Again, the court charged the jury, that "if the evidence shows that a specific amount of gold dust was given to Reynolds, that it was mixed with his own, and that he was to have the right to exchange it for coin, or other things, and pay Goodenow a similar amount when he returned home from California, then Goodenow had no right to the specific gold dust itself, and cannot recover in this form of action." The last portion of these instructions was erroneous, for reasons already expressed in this opinion. We think too, it was calculated to mislead the jury in relation to the decision of the self-constituted tribunal on ship board. Where a man is under duress, and accused of theft, before a ship load of passengers, or before any other crowd of citizens, and under the emotions of fear, is constrained to agree to a trial before a portion of them, we think the proceeding too much assimulated to lynch trials to command the respect or commendation of judicial tribunals; especially where such proceedings, as in the present case, affect the rights of third parties, who had no participation in, or notice of them. There should at least be no hesitation to disturb their decision, so far as it affected the rights of Goodenow, who was in no way a party to the transaction.

We conclude then that the court below not only erred in refusing to give the instructions asked by the plaintiff, but also in giving the charge to the jury.

Judgment reversed.

Smith & McKinley, for appellant.

T. S. & D. S. Wilson, and *Hempstead & Burt* for appellee.

Dubuque *v.* Clayton Co.

Under the act to establish the boundary lines of Dubuque, Clayton and other counties, each county named, as it became organized, was liable to liquidate and pay its portion of the indebtedness of the original county of Dubuque; consequently a petition for mandamus against one of the organized counties need not aver that all the other counties are organized

Error *to Clayton District Court.*

Opinion by Greene, J. A proceeding by mandamus commenced by Dubuque against Clayton county, to require the commissioners of Clayton to pay that county's *pro rata* of the county indebtedness which was contracted when Clayton county was a part of Dubuque.

Iowa, while a part of Wisconsin, was comprised in two counties, Dubuque and Des Moine. The boundary line between the two, ran due west from a point on the Mississippi river, a little south of Davenport. In 1837 the Wisconsin legislature subdivided Dubuque into a number of other counties, by "an act to establish the boundary lines of the counties of Dubuque, Clayton, Jackson, Benton, Linn, Clinton, Johnson, Scott, Delaware, Buchanan, Cedar, Fayette and Keokuk, and to provide for the location of the seats of justice in said counties, and for other purposes." Among the other purposes, this act provides "that the proper authorities of the several counties hereby established, so soon as the said counties shall become organized, shall liquidate so much of the debt now due and unpaid, by the present county of Dubuque, as may be their legal and equitable proportion of the same, according to the assessment value of the taxable property which shall be made therein."

In the court below, the attorney for Clayton county filed a demurrer to the petition for mandamus, and also a

motion to quash the writ and dismiss the proceedings. Both of which were sustained by the court.

1. Under the demurrer it was contended that the act of 1837 could not be enforced till all the counties named in the law were organized. But the law itself speaks of those counties as "*hereby established*,"—Laws of 1837, § 21—and then refers to the liability that should "so soon as the said counties should be organized," be attached to each, "in accordance to the assessment value of the taxable property." In order to arrive at the *pro rata* indebtedness of an organized county, it was not necessary that all the counties named in the act should be organized by the election of officers, &c., because the assessment value of the taxable property of all the new counties was ascertainable, whether they were all so organized or not. The territorial extent and boundaries of each new county, created by the act, were defined by law, and thus a distinct locality could be given to each item of taxable property. It appears that this duty had been performed by the appropriate officers, and the liability of each county ascertained, and, therefore, as each county became organized, the obligation was created to liquidate its portion of the general indebtedness.

The demurrer appears to have been sustained because the petition does not aver that the several counties mentioned in law had been organized. But as the petition makes the averment in relation to Clayton county, and as the county became liable on such organization, we think the demurrer should have been overruled.

Judgment reversed.

D. S. Wilson and *J. Burt*, for Dubuque county.

Smith & McKinley, for Clayton.

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ACKNOWLEDGEMENT.

A certificate of acknowledgement is good, if not in the language of the statute, provided, the words in the certificate substantially comply with the object and meaning of the statute. *Tiffany* v. *Glover*, 387

See DEED, 8, 9.

ACTION.

1. A person owning an undivided interest in land may recover to the extent of his interest, in an action of right. *Hughes* v. *Holliday*, 30

2. In an action of right against an occupying claimant, he will not be liable for any damages, if it appear at the trial that the defendant had made, or even purchased valuable improvements on the land. *Wright* v. *Stevens*, 63

3. B. sold to F. a horse which had been stolen by R., and taken from F. by the owner; held that F. could recover in assumpsit the price paid for the horse, even if the thief had not been tried. *Barton* v. *Faherty*, 327

4. Plaintiffs may recover on *indebitatis*, and common counts in assumpsit for work and labor performed under a special contract, when the stipulations of the contract were so materially departed from under defendant's directions, that it could not be sued on specially. *Stewart* v. *Craig*, 595

5. Where the property of G. has been taken and converted by S., G. may waive the tort and sue in assumpsit. *Goodenow* v. *Snyder*, 599

6. Where the gold dust of G. was sent to him in charge of R., and where it was subsequently mixed and taken by force from R. and delivered to S., and by S. converted into money; held that G. could recover from S. in assumpsit. *Ib.*

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See ACTION, 1, 2, 3.

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See NEW TRIALS, 1.
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See GARNISHEE.

AGREEMENT.

See CONTRACT.

AMENDMENT.

See PLEADING.

APPEAL.

1. When an appeal from a justice of the peace was taken subsequent to the day of judgment, notice of such an appeal should be served upon appellee at least ten days before the trial term in the district court, unless appellee waives notice by appearance. *McCormick* v. *Bishop*, 99

2. If the appellant neglects to file his recognizance, in the district court, within the time granted, it is not error in the court to dismiss the appeal. *Crow* v. *French*, 124

3. Where an appeal bond is not in form or substance a recognizance such as is required by statute for appeals from justices of the peace, it is error to render judgemnt against the sureties in the summary method directed against sureties in a recognizance. Rev. Stat. 336, § 16. *Wilson* v. *Knight*, 126

4. Parties may by agreement submit a matter in dispute to the decision of a justice of the peace and, waive the right of appeal. *Lyon* v. *Sanders*, 332

5. Where the evidence is not brought up on appeal in equity, the finding of the court below upon the facts in the case will be regarded as conclusive. *Hamilton* v. *Walters*, 556

APPEARANCE.

1. The judgment entry stated that "the parties, by their attorneys, submitted the cause to the court," held that this was not sufficient to show the appearance of one of two defendants on whom no service was had. *Kite* v. *Bonafield*, 199

2. Where a party appears in a case, it is an appearance to the notice as well as to the writ of attachment. *Winchester* v. *Cox*, 575

See APPEAL, 1.
PROMISSORY NOTES, 4.

APPRAISEMENT.

See JUDICIAL SALES, 4, 5, 6.

ASSAULT, &c.

1. An assault with intent to commit bodily injury, not justifiable by "considerable provocation," if the circumstances show "an abandoned and malignant heart. *Winfield* v. *State*, 339

2. An assault not justified by a mere suspicion or fear of an encroahment. *McAuley* v. *State*, 435

3. A party has no right to use force, unless really necessary to protect his possession or property. *ib.*

ASSIGNMENT.

See TORTS, 1.
SETTLEMENT, 2.
PROMISSORY NOTES, 3.

ATTACHMENT.

1. In attachment proceedings, a delivery bond, executed to the satisfaction of the sheriff, removes the lien from the property attached, and leaves it under the debtor's control, subject to his debts, or to another attachment levy; and the fact of its being subsequently attached will not satisfy the conditions of the delivery bond. *Jones*, v. *Peasley*, 52

2. The condition of the delivery bond can only be avoided when the property to be delivered has been lost or destroyed by unavoidable accident or without negligence. *ib.*

3. Evidence that an attachment debtor, while residing in another state, and over ten years before was embarrassed, litigious, and had put his property out of his hands is not

admissible or relevant to prove that "he *is* about in some manner to dispose of or remove his property with intent to defraud his creditors." *Lewis* v. *Kennedy*. 57

4. The proceeding by attachment is alone authorized by statutory provisions, and can only be maintained by a substantial compliance with the requirements of the statute; hence an attachment proceeding is not valid unless the requisite affidavit and bond are filed. *Edes* v. *Pitkin*, 77

5. An act "to prevent and punish the owner and masters of steamboats," &c. Laws of 1845, p. 43, does not *per se* authorize attachment proceedings. If any attachment is issued as proposed by the sixth section of that act, it must still conform to the general attachment law. *ib.*

6. A trial of the right of property under attachment, is no bar to an action of replevin, for the same property, *Merrill* v. *Miller*, 104

7. An order of the district court, dissolving a writ of attachment, vacates the attachment lien. Such lien is also vacated by a judgment against the plaintiff on demurrer, if rendered absolute by his failure to amend, or to except to the ruling of the court, on points of error for the supreme court. *Harrow* v. *Lyon* 157

8. Where a judgment appears of record to be final against the attaching plaintiff, the attachment lien not revived as against third parties, if the judgment is subsequently reversed. *ib.*

9. Any defect in an attachment affidavit or bond can only affect the attachment proceeding, and not the suit, or action upon which the attachment issued. *Elliott* v. *Mitchell*. 237

10. The return of the officer upon the writ, must constitute the foundation of all subsequent proceedings against the property, under attachment. GREENE, J. *contra*, *Tiffany* v. *Glover*. 387

11. The attachment proceeding being in derogation of common law, by virtue of a special statute, summary and extraordinary, the district court is therefore *quo ad hoc* a court of limited jurisdiction. GREENE, J. *contra*. *ib.*

12. Where the sheriff did not return in express words that the "property attached was the property of the debtor," but merely returned as follows: January 2d, 1849, levied the within writ by attaching" the land described, and the report of appraisers; *held* that the levy was void, and gave no jurisdiction to the court over the property attached; held also, that such levy could not be favored by legal intendment, and could be declared void in a collateral proceeding. GREENE, J., *contra*, *ib.*

13. Where an affidavit is made for a writ of attachment against only one of two joint debtors, and does not show that the other is solvent or a nonresident, the attachment against the one should be quashed. *Courier* v. *Cleghorn*. 523

14 Where an affidavit is filed for an attachment against joint obligors, it should show that they all come within the provision of the statute, or the writ should not be issued. *ib.*

15. An attachment should only be issued when it seems necessary to secure the debt. *ib.*

16. A petition for attachment, under the Code, should aver one of the following facts: That as plaintiff verily believes the defendant is a foreign corporation, or is acting as such; or is in some manner about to dispose of his property with intent to defraud his creditors; or is in some manner about to remove his property out of the state, without leaving sufficient remaining for the payment of his debts, with intent to defraud his creditors; or has disposed of his property in whole or in part, with intent to defraud his creditors; or has absconded so that the ordinary process cannot be served upon him. *Lockard* v. *Eaton*. 543

See ATTACHMENT BOND.

ATTACHMENT BOND.

1. An appeal from a justice of the peace to the district court, in an attachment suit will not release the plaintiff from liability on his attachment bond; as the appeal bond is not substituted for the attachment bond. *McCall* v. *Bradley*, 201

2. An attachment bond should be made for the benefit of the party against whom the writ is issued. *Courrier* v. *Cleghorn*, 523

ATTORNEYS.

1. Where an attorney confesses judgment against a party, without authority, the party injured is entitled to relief in equity on the ground of fraud. *Powell* v. *Spaulding*, 441

2. An accusation against an attorney should so specify the words alleged to be insulting, and so describe the acts alleged to be disrespectful, that the accused may know what words or acts he is called upon to defend. *Perry* v. *State*, 550

3. An attorney may be rejected from the bar for making a false oath or a false professional statement. *ib.*

4. Where the evidence against an attorney tends to establish only two or three of the charges against him, and leaves the other charges without any proof, a judgment goes too far which finds him "guilty of the charges in said accusation." *ib*

5. The finding or judgment, should specify the particular charge or charges upon which an attorney's guilt is pronounced. *ib.*

See DISTRICT JUDGE.
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BANKRUPTCY.

1. In the absence of fraud a decree in bankruptcy, under the U. S. law of 1841, is a conclusive discharge of all debts provable under the law. *Magoon* v. *Worfield*. 293

2. The failure of the bankrupt to include the name of a creditor in his schedule, or to notify him of the proceedings, in the absence of circumstances evincing the intention to deceive, will not justify the inference of fraud. *ib.*

3. The record and decree, without the certificate, may be received as evidence of a discharge in bankruptcy. *ib.*

4. In a proceeding on *scire facias* to revive a judgment, defendant recovered judgment on a plea of bankruptcy, nearly three years after the case was brought to supreme court, without the plea or certificate of bankruptcy; held that as the judgment entry shows that there was such a plea filed, it will be presumed that the plea was regularly filed with the certificate, and that the proceeding below was correct. *Budyman* v. *Viele*, 297

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A bill of discovery is subject to equity jurisdiction only, and cannot come up for correction of error at law. *McDaniel* v. *Plumbe*, 331

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BOATS AND VESSELS.

1. The act to provide for the collection of demands against boats and

vessels, only authorizes suits commenced within one year after the cause of action accrued. This limitation is absolute and jurisdictional, and need not be pleaded. *Newcomb* v. *S. B. Clermont*, 295

2. The steamboat act is in derogation of the common law, and should be strictly construed; but still, in a manner to give full effect to the remedy intended. *ib.*

BONDS.

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Where the grounds of error, alleged in an affidavit for a *certiorari*, are palpably insufficient, and show no error before the justice, the writ of *ceritorari* may be dismissed, on motion, in the district court. *Elliot* v. *Mitchell*, 237

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1. The doctrine of champerty and maintenance not applicable to this State. *Wright* v. *Meek*,, 472

COERCION.

1. The decision of a self-constituted tribunal not valid, and should not be respected by judicial tribunals, where coercion has been used, *Goodenow* v. *Snyder*, 509

CHANGE OF VENUE.

1. Notice for a change of venue was given on the second day of the second term after suit, without stating in the notice or petition any reason for the delay; held that this did not amount to reasonable notice as required by statute. *Wright* v. *Stevens*, 68

2. Where by agreement, the defendant was permitted to take a change of venue, in time for trial at the next term, but neglected to do so; held that it was not error to refuse his motion for a change of venue at a subsequent term. *Piles* v. *Charles*, 109

CLERK.

See DAMAGE, 1.

COGNOVIT.

See JUDGMENT, 3.

COMPROMISE.

1. A compromise must have been fairly and reasonably made in order to be enforced. *Norris* v. *Slaughter*, 116

2. In a compromise by which the creditor agrees to take in satisfaction, less than the amount his due, if the debtor fails to comply with the terms of the compromise, the creditor is entitled to the full amount of his claim. *McClung* v. *Lyster*, 182

See CONTRACT.

CONSIDERATION.

1. In a settlement between an administrator and a creditor of the estate, the administrator gave his individual note in satisfaction, due in nine months; held that the consideration was sufficient to justify a recovery against the maker; held also, that the transaction was an admission of assets in the hands of the administrator. *Thompson* v. *Maugh*, 342

2. The act of giving a note is *prima facie* evidence of consideration. *ib.*

See CONTRACT, 1.
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CONSTRUCTION.

See STATUTE.

CONTRACT.

1. A written contract made between parties to a suit to compromise and settle, is valid, even if made without any other consideration. *Taylor* v. *Galland*, 17

2. A special contract for work must prevail unless the departure from it has been so great and general as to render it impossible to connect the contract with the work, or to determine to what part of the work the contract can apply, *Hummer* v. *Lockwood*, 90

3. Such a contract should regulate the estimates of measure and value. *ib.*

4. A mere promise to take part of a debt for the whole, is without consideration and void. *Norris* v. *Slaughter*, 116

5. A contract, merely executory, and without consideration, cannot be enforced; not even as a compromise for the settlement of a family difficulty. *ib.*

6. If by direction of defendants the plaintiffs were prevented from performing a contract of work, they could recover fer the work done in proportion to the stipulated price of the whole job. *McCausland* v. *Cresap*, 161

7. Where a mill was to be built, like a certain mill described in the contract, it was held that if the defendants directed or assented to a departure from the model mill, they would not be entitled to a set off against plaintiff's demand, for such departure. *ib.*

8. If, in the plan of a mill, the defendants directed or assented to alterations, which delayed the completion beyond the stipulated time, the defendants would not be entitled to damages for such delay. *ib.*

9. Where services performed were to be paid for in land, the party may recover, though the contract was not in writing. *Benson* v. *Urton*, 228

10. In default of payment in land for services rendered, the party may recover the value of what he was to receive. *ib.*

11. A contract in relation to land claims, which stipulated a penalty of fifty dollars, to be paid as damages by the party failing to perform should be enforced at law and not in equity. *Rynear* v. *Neilin*, 310

12. A party must restore what he has received on a contract before it can be rescinded in equity. *ib.*

13. If a signature is applicable to the substance of the written agreement and is put there by the party, or by his authority, it is good whether at the top, in the middle or at the bottom of the instrument. *Wise* v. *Ray*, 430

14. Where an instrument is written by R. and subscribed by W., and stipulates that W. has sold and agrees to deliver pork to R. at the place and price mentioned, the undertaking is mutual. *ib.*

15. Where a special contract for work stipulated that payment could be made half in cash and half in goods, and when payment was re-

fused by defendant after he accepted the work, held that plaintiffs might sue as on a money contract. *Stewart* v. *Craig*, 505

16. Where a party, in selling land for a tavern stand, stipulated that he would discontinue his tavern within half a mile of the land sold, as an inducement to the purchaser, upon which he bought the land and erected tavern buildings; held that such a contract is valid, and not an illegal restraint upon trade. *Heichew* v. *Hamilton*, 596

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PROMISSORY NOTE, 3.
SPECIFIC PERFORMANCE, 3, 4.

COSTS.

Where the law provides that the costs of partition shall be paid in the first instance by the petitioners, but eventually by all the parties in interest, it is not necessary that the final judgment for cost against all the parties should show that they were first paid by the petitioners. *Sprott* v. *Reid*, 489

See ERRORS, 2.
JUDICIAL SALES, 4.
JUDGMENT, 4.

COUNTY.

1. By act of 1848, the district court of Lee county, was authorized to hold terms at Keokuk, provided the city furnish the necessary rooms free of charge; held that the county is not liable for the rent of such rooms. *Lee Co.* v. *Deming*, 101

2. Under the act to establish the boundary lines of Dubuque, Clayton and other counties, each county named, as it became organized, was liable to liquidate and pay its portion of the indebtedness of the original county of Dubuque; consequently a petition for mandamus against one of the organized counties need not aver that all the other counties are organized. *Dubuque* v. *Clayton Co.*, 604

See LEE COUNTY.

COURTS.

1. The Legislative act of January 19. 1839, confers jurisdiction upon the district court over the property and person of insane persons, and similar powers are conferred upon the probate courts, by the act of January 14, 1841; held that the jurisdiction of these courts is rendered concurrent. *Hummer* v. *Hummer*, 48

2. Objections not raised in the district court, will not be favored in the supreme courts. *Packer* v. *Coekayne*, 111

3. The supreme court cannot entertain original jurisdiction. *Perkins* v. *Testerment*, 207

4. The supreme court will not disturb matters of fact decided by the court below, when the bill of exceptions does not purport to give all the evidence. *Napier* v. *Wiseman*, 246

5. The supreme court has no original jurisdiction either at law or in equity. It can only review and correct those proceedings which have been passed upon by the court below. *Powell* v. *Spaulding*, 417

6. Evidence of proceedings below, *dehors* the record, not admissible in the supreme court. *ib.*

See ATTACHMENT, 11, 12
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DEPOSITIONS, 1,
DISTRICT JUDGE,
INSTRUCTIONS,
JURISDICTION,
LEE COUNTY.
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1. In an action of covenant on breach of warranty in a deed, the measure of damages is the consideration money paid, and interest. *Swafford* v. *Whipple*, 261

2. If, in an action of covenant, issue is joined on defendant's plea that he had title at the execution of the deed, the onus devolves on him to show the fact. *ib.*

See SPECIFIC PERFORMANCE.

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The clerk may assess damages under such computation as the court may direct, in a case were the facts were submitted to the court. *Rife* v. *Ingram*, 125.

See ACTION, 8,
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See TORTS, 2.

DEFAULT.

Where a decree by default charges an indebtedness upon land in which a co-defendant not defaulted is interested, such co-defendant may show that the decree was unauthorized. *Broghill* v. *Lash*, 357

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DEED.

1. Where a deed purports to have been made by virtue of a power of attorney, it is incumbent on the party offering it in evidence, to produce the authority upon which the deed was executed. *Hughes* v. *Holliday*, 30

2. Record evidence and even parole proof are admissible to show that a deed, absolute on its face should have no greater effect than a mortgage. *Hall* v. *Savill*, 37

3. The form of the deed absolute should yield to the substance of the contract, as between the parties, and all others who had actual notice of it and who have not been misled by the form. *ib.*

4. If the grantor conveys to the grantee the same lands that were conveyed to grantor by a deed clearly designated and of record, in which the land is fully described, the description is made good by such reference. *Nightingale* v. *Walker*, 96

5. Where a party sought to have a deed set aside on ground of fraud in a failure of payment as agreed, it was held that the deed could not be contradicted in that particular unless by competent proof of fraud in the consideration. *Rynear* v. *Neilin*, 310

6. Where there is ambiguity on the face of the deed, the construction should be most favorable to grantee. *Marshall* v. *McLean*, 363

7. M. executed a deed of land to five persons and their successors, as trustees, to be appointed, regulated and governed, in the manner stipulated in the deed, in trust for a Congregational Church, to be subsequently organized in the town of Keokuk, under certain regulations and contingencies; some time after M. died, and his heirs conveyed the same land to S. T. M.; held that as the object of the trust was not in *esse*, and as the regulations and contingencies had not been observed, the deed first made could not be sustained; held also, that the deed from the heirs divested all

contingent interest under the first deed, and vested the title in S. T. M. *Marshall* v. *Chittenden*, 382

8. A deed executed in another state is good under the statutes of 1840 and 1841, whether acknowledged according to the laws of that state or according to the statute of 1840. *Smith* v. *Walsh*, 498

9. Proof of the execution of a deed which has been duly acknowledged is not necessary, unless denied under oath. *ib*,

10. Where the descriptive words in a deed are free from ambiguity, and clearly designate the land granted, and are followed by an alternative and disjunctive clause, designating no particular land, such alternative clause may be regarded as surplusage, and will not impair the deed. *Wright* v. *Cochrane*, 507

See ACKNOWLEDGEMENT.

DESCRIPTION.

See JUDICIAL SALE, 2.

DEED OF TRUST.

Where a deed of trust provides that thirty days notice shall be given in some newspaper, prior to sale, the publication should be continued weekly until the thirty days have expired, between the first and last publication. *Armstrong* v. *Scott*, 433

DEMAND.

For labor or property payable at a particular time and place, a demand not necessary. *Packer* v. *Cockayne*, 111

See PAYMENT, 1.

DEPOSITIONS.

Depositions taken after trial in the district court, will not be entertained in the supreme court. *Perkins* v. *Testerment*, 207

DESCRIPTION.

1. A particular description in a deed ought not to limit the grant made certain under a general description, unless it can be clearly ascertained from all the words used that it was the intention of the parties to restrict the grant by the particular description. *Marshall* v. *McLean*, 363

2. A judgment of partition is matter of public record, and where a recorded deed refers to such judgment and conveys all the land designated under a certain described share in said partition, it amounts to full notice of all the land or lots comprised in such described share, even of such as might be omitted in a particular description given in the deed. *ib*.

See DEED, 4.

DISTRICT JUDGE.

A district judge cannot delegate his official authority to another, nor adopt the acts of an attorney upon the bench, as the judicial acts of the court; nor can such authority be conferred by agreement of the parties to a suit. *Michales* v. *Hine*, 740

DRAM SHOP.

Where a house is indicted it should be so described as to leave no reasonable doubt of its locality,

See INDICTMENT, 8.

DOWER.

1. A crop of wheat growing upon land at the time it was set off and confirmed to the widow as dower, will pass with the land and be considered a part of her dower estate, unless expressly reserved. *L. Ralston* v. *Ralston*, 533

2. Where the wife's dower has been set apart to her, agreeable to the Code, §§ 1294, 1295, and where her intestate husband left no issue, she is entitled to one-fourth of the remaining two-thirds, equal to one-half of the entire estate after paying the liabilities. *M. Ralston* v. *Ralston*, 535,

DUBUQUE COUNTY.

See COUNTY, 2.

EMBEZZLEMENT.

See LARCENCY, 1, 2.

EQUITY.

1. In equity, *time* not usually regarded as essential, where circumstances of a reasonable nature, prevent perfomance within the time stipulated. *Garretson* v. *Vanloon*, 128

2. Time may be made material by express agreement, or by the nature of the contract if so intended by the parties. *ib.*

3. In equity, as at law, the intentions of parties should prevail in such cases, and when the *time* of performance appears to be a distinct or essential feature in the contract, it should be enforced. *ib.*

4. T. filed his bill against the heirs of P. for land which was entered in the name of P. about two years before his death, but there was no evidence that T. furnished the purchase money, no written memorandum of the trust, no effort made by T., during the life of P., to obtain a deed, no objection made to P.'s converting much of the best timber to his own use, nor to his occupation and exclusive control of the premises; but there was doubtful evidence that P. declared, some time before his death, that the land was to be divided between him and T.; held that the circumstances do not create a trust, nor show equity in T. *Testerment* v. *Perkins*, 209

5. Where a bill shows equity on its face, and is only defective in part, a general demurrer to the entire bill should be overruled. *Harrington* v. *Cubbage*, 307

6. When a bill discloses a remedy for complainant under the statutory action of right, or of ejectment, and fails to show that the title could not be settled at law so as to prevent a multiplicity of suits, it may be dismissed. *ib.*

7. The door of equity is open only to such as have been or may be injured, and the injury sustained or apprehended should be clearly set forth in the petition. *Piggott* v. *Addicks*, 425

8. Where a party has a plain and adequate remedy at law, he cannot resort to chancery. *ib.*

9. Where there is unity of interest as to the object to be attained by a bill in equity, the parties seeking redress may join in the same complaint. *Powell* v. *Spaulding*, 443

10. Where the land of an intestate is in charge of an administrater, he may be made a joint party to a bill in chancery in relation to that land, the same as the real party in interest. *ib.*

11. A bill is not multifarious where

all the parties are interested in the same claim of right, and where the relief sought is of the same general character. *ib.*

12. Where the exhibits referred to in a bill are matters of public record, they need not be filed in court. *ib.*

13. A bill has equity, which seeks to set aside a judgment of partition on the ground of fraud, and alleges the fraud generally; and also specially charges the facts and circumstances of fraud, under which the complainants were wronged by the confederation of the parties, their agents and attorneys, and where those facts and circumstances show not only actual, but constructive fraud. *ib.*

14. If any of the charges of fraud in a bill would be good at law, and such as would justify relief or discovery, a demurrer to the whole bill cannot be sustained. *ib.*

15. Where a bill charges that cunning, deception, falsehood and artifice were used to circumvent, cheat and defraud complainants of their rights, in a judgment of partition, and charges that defendants practiced fraud and imposition upon the court to procure such judgment, and where the charges indicate actual fraud in the judgment, a demurrer to the bill should not be sustained. *ib.*

16. Where a bill was filed to set aside a judgment in partition for fraud, and *pendente lite*, the complainant transferred his interest to his children, held that such transfer could not be pleaded in bar to the proceeding. *Wright* v. *Meek*, 472

17. A plea in bar not allowed in chancery, if it depends upon facts which have transpired since the filing of the bill. GREENE, J., *contra*. *ib.*

18. Where the complainant transferred his equity subsequent to the filing of the bill, the purchasers may become complainants by supplemental bill. *ib.*

19. H. entered in his own name eighty acres of land in trust for W., and W. paid him the price agreed upon and took from H. an obligation to make a deed as soon as the patent should issue. H. subsequently assigned his duplicate to B., without consideration, and with notice that he had given a title bond to W., and B. soon after obtained a patent; held that B. might, in equity, be required to convey the land to W. *Hamilton* v. *Walters*, 556

See CONTRACT, 11, 12.

ERROR.

1. A judgment will not be reversed for a proceeding that cannot prejudice the plaintiff in error. *Hammitt* v. *Coffin*, 205

2. A failure to render judgment of cost against either party, is not ground for error. *Ross* v. *Hayne*, 211

3. Error in the court below will not be presumed; it must be affirmatively shown. *Budyman* v. *Viele*, 297

4. It is error to render judgment for a greater amount than is claimed by the petition. *Stiles* v. *Brown*, 589

See CERTIORARI,
COURTS, 2,
PLEADING, 4,
PRACTICE, 8.

ESTATE.

See FOREIGNERS, 1,
PLEADING, 4.

EVIDENCE.

1. Where a written contract appears on its face to be complete, it cannot be modified, varied or contradicted by parole proof; but if the writing seems to express only some parts of an agreement, parole evidence is admissible to prove other silent or doubtful parts of the contract. *Taylor* v. *Galland*, 17

2. When witnesses testified that they sold the claim to plaintiff, and it appearing on cross-examination, that they conveyed by quit claim deed, the refusal of the court to rule out the oral testimony in relation to the claim was not error. *Trimble* v. *Shaffer*, 233

3. Parole testimony of a clerk or his deputy not admissible to supply matter which should appear of record. *State* v. *Glover*, 249

4. Parole testimony admissible to show the true consideration paid on a deed. The amount named in a deed, only *prima facie* evidence of the amount paid. *Swafford* v. *Whipple*, 262

5. Parole evidence admissible to show fraud or a mistake in making a bill of lading. *Steamboat Wisconsin* v. *Young*, 268

6. Parole proof admissible to show that the consideration money named in a deed had not been paid. and to show that the deed did not name the true amount. Such proof should be strong and positive. *Hall* v. *Perry*, 579

7. Parole evidence admissible to show that the defendant was induced to sign the contract under the fraudulent mirepresentations of plaintiff. *Hunt* v. *Carr*, 581

8. The locality of land designated within a given section, township, and range, as established by government survey, is matter of public record witnin the judicial knowledge of courts. *Hypfner* v. *Walsh*, 509

9. Where the land in controversy is shown by the pleadings to be within the venue of the court, proof of its locality is not necessary. *ib.*

10. Where witnesses were called upon to testify in behalf of the plaintiff in relation to the difference in the value of a barn, as built by the defendant and that which the contract required, it was error to admit their estimates of that difference, if those estimates were formed alone upon plaintiff's statement of what the contract required. They should have been made upon the contract itself, and not upon the plaintiff's statement. *Brooks* v. *Hazen*, 553

11. It will be presumed that the judgment was justified by the evidence. *McCormack* v. *Reece*, 591

12. In a contract between B. and H., B. at the time performed his part of the covenants by executing a bill of sale, while H. was to perform his covenants in future in the management of a suit, &c., all of which were averred to have been performed by the pleadings—and not traversed—held that it was unnecessary to prove performance in order to a recovery. *Taylor* v. *Galland*, 17

13. Cumulative evidence may be introduced by plaintiff for the purpose of rebutting defendant's testimony. *Davidson* v. *Overhulser*, 196

14. Where a party plaintiff was called upon to testify in relation to a certain fact in behalf of defendant, plaintiff's attorney has no right to cross-examine him in relation to other matters. *Everly* v. *Cole*, 239

15. The *onus probandi* lies upon that party who seeks to support his action or defense by facts of which he

is supposed to be cognizant. *Swafford* v. *Whipple*, 262

16. Where an original invoice of goods appears by evidence satisfactory to the court, to have been lost or mislaid, a memorandum of the items, copied by the witness, as clerk of the party, was admitted in order to show what items were in a box for which the steamboat was sued. *S. B. Wisconsin* v. *Young*, 268

17. A party cannot object to testimony introduced by himself. *Walker* v. *Stannis*, 440

See ATTACHMENT, 3,
COURTS, 6,
DEED, 1, 2, 5, 9,
NEW TRIALS, 3,
PLEADING, 4,
PROMISSORY NOTES, 1, 14,
TAX TITLE, 1, 4,
WITNESS, 1.

EXECUTION.

1. As a general rule, an execution must pursue and be warranted by the judgment; but a variance in date or description which might have been amended, is not sufficient to invalidate the sale in a collateral proceeding. *Sprott* v. *Reid*, 489

2. Where an execution sufficiently identifies the judgment to render certain the authority upon which it issued, it will invest the sheriff with power to sell. *ib.*

3. The death of defendant in execution at the date of sale cannot affect its validity. *ib.*

See SCIRE FACIAS.

FOREIGNERS.

The non-resident foreigner cannot inherit the estate of his resident parent. GREENE, J., *contra*. *Stemple* v. *Herminghouser*, 408

FRAUD.

See BANKRUPTCY,
EQUITY, 13, 14, 15, 16.

GAMING.

See INDICTMENT, 2, 3.

GARNISHEE.

Judgment should not be rendered against a garnishee when his answer shows that the goods and credits of the debtor came into his hands in his capacity of clerk or agent for a third party, and that he had delivered them to his employers who were creditors of said debtor. *Tevis* v. *Foster*, 71

GRAND JURY.

1. A grand jury should be composed of not less than fifteen persons, under the Code. An indictment found by a jury of less than fifteen, though approved by twelve jurors, is not good. *Norris House* v. *State*, 513

2. A party cannot be legally brought to trial on an indictment found by a grand jury not authorized by law, and he may take advantage of such indictment on motion. *ib.*

HALF BREED TRACT.

1. The judgment of partition absolute. *Wright* v. *Millard*, 86

2. The judgment of partition of the Half Breed lands in Lee county, final and conclusive of all rights therein adjudicated. *Hypfner* v. *Walsh*. 509

See JUDICIAL SALE.

HUSBAND AND WIFE.

1. Husband not liable, by mere implication of law to an attorney for services rendered to his wife in obtaining a divorce from him. *Johnson* v. *Williams.* 97

2. Such professional services not to be regarded as necessaries. *ib.*

See DOWER.

INDICTMENT.

1. An indictment found should be presented in open court, in presence of the grand jury, and the fact should be certified of record. *State* v. *Glover.* 249

2. Where sections 4 and 5, of the gaming law, prohibit the same games of chance, and the 4th "excepts games of athletic exercise," and the 5th § contains no exception, held that an indictment averring no exception would be good under the fifth section. *Romp* v. *State,* 276

3. In an indictment for suffering gaming it is not necessary to designate the persons who played, nor the amount of money or kind of property lost or won. *ib.*

4. The negative exception, in a penal act, need not be averred, as the defendant may show in defense that his acts come under such exception. *ib.*

5. When an offense is charged in the language of the statute, it is sufficient. *ib.*

6. An indictment is good, if it clearly charges all the facts and circumstances which constitute the offense under the statute. *Winfield* v. *State.* 339

7. An indictment not to be quashed, or a new trial granted where dates are given in figures instead of words. *ib.*

8. Where an indictment is found against a house as a "dram shop," the owner occupies the same position and is entitled to the same benefits and protection from the constitution and laws as if the indictment was against himself.

See DRAM SHOP.
NEW TRIALS, 3,

INHERITANCE.

See FOREIGNERS, 1.

INJUNCTION.

A bill for an injunction should be verified by affidavit. *Stump* v. *Buzick,* 245

INSOLVENCY.

A discharge under the insolvent laws of a State does not bar a non-resident creditor who did not consent to the discharge, nor is such non-resident creditor barred from his action by having appeared and contested the proceedings in insolvency. *Collins* v. *Rodolph,* 299

INSTRUCTIONS TO JURY.

1. Where the evidence shows that the plaintiff held title to only two-thirds of a lot, the court should, when requested, instruct the jury that he could only recover to the extent of his proof. *Hughes* v. *Holliday,* 30

2. A court not required to give irrelevant instructions. *Packer* v. *Cockayne,* 111

3. If the charge to a jury is not sufficiently pointed or explicit, the attorney should request and point out more direct instructions. *McCausland* v. *Oresap,* 162

4. Instructions, substantially correct, and not calculated to mislead the jury not erroneous. *ib.*

5. A court need not instruct a jury upon an abstract proposition. *Tryon* v. *Oxley*, 289

6. An instruction on an abstract principle of law, and not applicable to any question of fact before the jury, should be refused. *Hypfner* v. *Walsh*, 509

7. Where the court recites the facts claimed to have been proved, and directs the jury that they are to determine whether the wrongs were perpetrated or the facts proved, it does not amount to an instruction upon the facts in the case. *Pritchett* v. *Overman*, 531

8. Where a court charged the jury upon the legal effect of facts, and in impressive argumentative terms, urged the support of the majesty of the laws against mob violence, it cannot be regarded as calculated to mislead the jury. *ib.*

See ACTION, 2.

INTEREST.

1. In computing interest, where the payment exceeds the amount of interest due, calculate interest on principal up to date of payment, add interest to the principal and deduct payment. *Huner* v. *Doolittle*, 76

2. When the payment falls short of the interest due, calculate interest up to a time when the payment will overrun the interest due on the principal and then deduct the payment, and on the balance commence again to compute the interest. *ib.*

3. Interest, not always an equivalent for default of prompt payment. *Garretson* v. *Vanloon*, 128

See LAND TITLES, 1.
MORTGAGE, 3.

JUDICIAL SALE.

1. Where land was first sold in satisfaction of a junior judgment, and then subsequently sold to satisfy a senior judgment; held that the sale under the senior judgment should prevail. *Marshall* v. *McLean*, 868

2. To defeat a sheriff's deed under the revenue law of 1844, it may be shown that the assessment list was not filed before June 15th, 1844; that the county and territorial list was not returned before the first Monday in January, 1845; and that the owner of the land had personal property in 1844 and afterwards. GREENE, J., *contra*. *Laraby* v. *Reid*, 419

3. Land was sold on execution in July, 1844, for $21.43, the amount of clerk's and sheriff's fees, but the deed was not executed and recorded till November, 1848. An alias execution was issued on the same judgment in December, 1844, and was signed by the same person, as clerk, who bought under the first execution, and the same fee bill for which the land was first bid off was attached to and claimed under the alias execution. The land was sold under the alias to A. in February, 1845, and the deed executed to him in July, and recorded in August, 1846. It was proved that the plaintiff said soon after the first sale that he should abandon the purchase. Held that the court below was justified in charging the jury that title to the property was not in the plaintiff. *Walker* v. *Stannis*, 440

4. A judgment for cost does not create the obligation of a contract within the U. S. constitution and the special session laws of Iowa of 1844; and where such judgment was rendered prior to the valuation law, and the execution issued under that law, and where the record shows affirmatively that the property was sold without valuation, the sale is void. *Sprott* v. *Reid*, 489

5. A purchase at sheriff's sale will be protected, if the sale was authorized by a judgment execution and levy, and if the purchaser paid the price stipulated under appraisement. The fact that the appraisement was not made upon actual view of the premises as directed by statute, will not invalidate the sale. *Johnson* v. *Carson*. 499

6. A *bona fide* purchaser at a sheriff's sale under the judgment in partition of the Half Breed lands, cannot be deprived of his title by proof, *dehors*, the record, that the execution defendants were minors without guardians, when the judgment was rendered against the property. *ib.*

See EXECUTIONS,
JURISDICTION, 4.
LAND TITLE.

JUDGMENT.

1. Where a judgment exceeds the verdict in amount, it will not be reversed, if the excess is remitted. *Morrill* v. *Miller*. 104

2. The same faith and credit to be given to the judicial proceedings of other states, as they have within the state whence they are taken. *Hindman* v. *Mackall*, 170

3. Where a *cognovit* promised payment in ten months after date, but authorized a judgment at the next term of court after the date of the judgment note, and before it was due; held, that judgment could be entered at that term of court, with a stay of execution until the ten months elapsed. *McClish* v. *Manning*, 223

4. A judgment for costs, a necessary incident to a judgment in partition and is not conditional where it awards execution against such of the parties as should fail to pay their respective portions within sixty days.

See DESCRIPTION, 2.
ERROR, 1.
JURISDICTION, 3, 4.
PARTITION, 4, 5, 6.
PLEADING, 3, 4.

JURISDICTION.

1. The jurisdiction of a superior court can only be taken away by express words of repeal, or irresistible implication. *Hummer* v. *Hummer*, 42

2. The law and equity jurisdiction of the supreme court should be kept distinct, under the constitution. *Cooper* v. *Armstrong*, 120

3. Where the record is silent in relation to the service of process, jurisdiction will be presumed, on the ground that courts of general jurisdiction are favored with that legal presumption, which forbids all inquiry into jurisdiction, in collateral proceedings. But if the record shows no service there is no jurisdiction over the person, and a decree against him is void. *Seeley* v. *Reid*, 374

4. Where the record shows that there was no jurisdiction, either over the parties or the subject matter, the judgment and sales under it are void, and may be so declared in a collateral proceeding; but where the record is silent upon facts necessary to confer jurisdiction, the law presumes the decision correct, and the judgment will be binding till reversed. *ib.*

See ATTACHMENT, 11, 12.
COURTS, 1, 3.

JURY.

1. Jurors cannot impeach their verdict upon their own affidavits. *Abel* v. *Kennedy*, 47

2. A jury was passed upon, and accepted by both parties in the evening, whereupon the court adjourned, and the jurors separated; in the morning the plaintiff challenged one of the jurors; held that it was error to refuse him this privilege under the circumstances. *Spencer* v. *DeFrance*, 216

3. The right of challenge may be exercised until the jurors are sworn. *ib.*

4. Where the defendant appeared, pleaded, &c., in a trial by the court without a jury, and the record being silent as to the consent of parties to waive a jury, it will be presumed that the consent was given. *McGuire* v. *Kemp*, 219

5. The defendant is entitled to a jury under the Code even if he refuse to advance the jury fee. The plaintiff should provide the fee or ample security. *Hine* v. *Sweeney*, 511

See NEW TRIALS, 1,
PRACTICE, 2,
VARIANCE, 1.

JUSTICES OF THE PEACE.

1. Strict rules of pleading not required before justices of the peace. *Packer* v. *Cockayne*, 111

2. A mere statement of the plaintiff's cause of action sufficient before a justice of the peace, without filing the transcript of judgment, upon which suit was commenced. *Collins* v. *Rodolph*, 299

3. Where the suit is founded on an instrument of writing, filed with the justice, and where the signature is not denied under oath, a non-suit should not be granted for non-appearance of the plaintiff. *Jewett* v. *McLelland*, 568

See VARIANCE, 2.

LAND CLAIMS.

1. Where it is proved that the boundaries of a claim have been once marked out according to law, the claimant need not show that the lines were kept fresh. *Trimble* v. *Shaffer*, 233

2. Where C. had a claim upon public land and relinquished the same to B., upon condition that he should advance the purchase money, enter the land and deed half of it to C., on his refunding his portion of the entrance money; held that the conditions were mutual, the considerations sufficient, and that a trust was created which took the case from the statute of frauds. *Brooks* v. *Ellis*, 527

3. An informal release of claim right to government land can impart no equity in the land after it has been purchased from the government. *Hamilton* v. *Walters*, 556

See PRACTICE, 12.

LANDLORD AND TENANT.

1. Where the language of a lease is not clearly expressed, the intentions may be ascertained by the leading terms and conditions of the lease collectively considered in connection with the nature of the transaction. *Packer* v. *Cockayne*. 111

2. In a farm leased for a term of three years it was stipulated that the lessee should build fences, without specifying the time, held that the fencing should have been done in time for the first crop. *ib.*

3. The lessee having abandoned the premises before the expiration of the lease, the lessor was entitled to possession and to back rents. *ib.*

4. A tenant cannot deny his landlord's title; nor justify an unlaw-

ful detainer by showing fraud in the lease. *Simons* v. *Marshall*, 502

5. When a lease stipulates that the tenant should cultivate land in a good farmer-like manner, and keep the fences in good repair, and where the tenant permitted the fences to become dilapidated, and suffered sheep to go in the orchard, by which young fruit trees were destroyed, the landlord may recover in assumpsit under the lease. *Elbert* v. *Wilson*. 520

6. Where land is leased for one-third of the crop, to be delivered to the lessor, he is liable in trespass if he goes upon the demised premises and takes corn therefrom. *Blake* v. *Coats*. 548

See MINERAL LAND.

LAND OFFICE CERTIFICATE.

Land office receipt or certificate made evidence of legal title, by statute. *Cavender* v. *Smith*, 349

See LAND TITLE, 3.

LAND TITLES.

1. In redeeming land a *penalty* of ten per cent. required on gross amount, and not an *annual interest* of ten per cent. *Dougherty* v. *Hughes*, 92

2. In purchasing land from the United States the party acquires absolute title from the date of the purchase or land office certificate; and from that date the land may be sold by the purchaser, and is as subject to judgment execution and sale before the date of the patent as it is after. *Cavender* v. *Smith*, 349

3. A government patent for land relates back to the date of the purchase, and is evidence of title in the patentee from the date of the certificate of purchase, and not from the date of the patent. *ib.*

4. Land held under a certificate from any land office subject to execution. *ib.*

5. Title acquired under execution sale cannot be defeated by execution defendant, on the ground that his patent for the land bore date previous to the sale. *ib.*

6. A purchaser with notice will be protected if he derive title from a *bona-fide* purchaser without notice. *Brace* v. *Reid*, 422

See ACTION OF RIGHT, 1.
DEED,
HALF BREED LANDS,
JUDICIAL SALES, 3,
RAILS.

LARCENY.

1. Where a person in the employment of another, was entrusted with a span of horses and wagon, and while thus in charge appropriates them to his own use, the crime is embezzlement, and not larceny under the statutes of Iowa. *Ennis* v. *State*, 67

2. To constitute the offense of larceny it should appear that the goods were procured *animo furandi*, or there should have been evidence tending to show that the property was delivered to the prisoner under the influence of false, fraudulent or improper efforts. *ib.*

See ACTION 3.

LEASE.

1. Parole evidence admissible to show that a party known as G. W. T., signed a lease in the name of E. H. T., and was in possession by virtue of that lease. *Simons* v. *Marshall*. 502

2. Where the payment of rent monthly in advance was stipulated as a condition of the lease, a failure to so pay the rent is a forfeiture of the lease. *Simons* v. *Marshall*, 502

LETTER OF CREDIT.

See PLEADING, 8.

LICENSE LAW.

1. Citizens of the town of Bellevue, are amenable only to the license law enacted for that town in 1844, for any unlawful sale of liquors within its limits. *State* v. *Neeper*, 337

2. The license law of the town of Bellevue not repealed, or to be interfered with, by the general license law of 1849. *ib.*

LIEN.

See ATTACHMENT, 8.

LIMITATION.

1. To avoid the statute of limitations by proof of a new promise, the proof must be clear and explicit, and the new promise, as a new cause of action, must be unequivocal and determinate. *Chambers* v. *Garland*, 322

2. A promise to pay a debt in land, under circumstances which would leave the impression that the promise was made to avoid litigation and trouble, and not to acknowledge a subsisting indebtedness, will not remove the limitation bar. *ib.*

LIQUOR.

Where liquor was sold by the dram in the grocery store of defendant, by a third party, when defendant was absent from the store, the evidence should show that the grocery was kept for the purpose of selling liquor by the dram; or that it was sold by direction or approbation of defendant, in order to justify a verdict against him. *Goods* v. *State*, 567

MALICIOUS PROSECUTION.

In an action for malicious prosecution the plaintiff must not only prove malice, but he must also show a want of probable cause. *Davis* v. *Cook*, 539

MINERAL LAND.

1. Under a parole license to work upon and prove mineral land for a share of the mineral raised, where the occupant has made expenditures in sinking a shaft and running drifts, the license cannot be revoked without refunding the expenditure, or giving the party at least six months notice. And although such parole license is within the statute of frauds, still when connected with such improvements to prove the ground, it is voidable only upon such compensation or notice. *Bush* v. *Sullivan*, 344

MONEY.

See CERTIFICATE OF DEPOSIT, 1.

MORTGAGE.

1. Where a deed was given to secure the payment of money, and a bond was given to reconvey on payment of the money, the deed should have no greater force than a mortgage as between the parties to the transaction and their agents and attorneys, if they were actually cognizant of the facts. *Hall* v. *Savill*, 37

2. The mortgager is considered the owner of the land, subject only to the lien of the mortgagee. *ib.*

3. A mortgager, after the mortgage become due, in consideration of further time, entered into an engagement to pay the mortgagee the additional sum of four per cent. interest on the balance due; held that such new engagement did not become a part of the mortgage, and should not be included in the decree of foreclosure. *Davis* v. *Jewett*, 226

4. A mortgager not required to pay the fees of the attorney employed by mortgagee in the proceeding to foreclose; nor can an attorney's fee be charged to a party merely because he executed a mortgage to indemnify mortgagee for indorsing his notes. *Bondurant* v. *Taylor*, 561

5. A chattel mortgage invests the mortgagee with the title to the property which can only be defeated by a compliance with the conditions of the mortgage. Upon a final failure to comply with those conditions the mortgagee becomes absolute owner. *Talbot* v. *DeForest*, 586

See DEED, 2, 3.

NEW TRIALS.

1. An application for a new trial on the ground of misconduct in the jury, should be overruled if supported alone by the affidavit of jurors. *Abel* v. *Kennedy*, 47

2. A motion for a new trial, on grounds *dehors* the record, should be sustained by extrinsic proof. *Cochran* v. *Knowles*, 115

3. Where there was evidence before the jury upon every material charge and specification in the indictment, a new trial should not be granted on the ground of insufficient proof. *Winfield* v. *State*, 339

See VERDICT.

NOTICE.

1. A defective notice cured, by going to trial on the merits, without exception to the ruling of the court in relation to the notice. *Wilson* v. *Knight*, 126

2. When a trial is required within five days after notice, a notice on the fifteenth brings the twentieth within the five days. *ib.*

3. Under the Code where service of notice has been made by publication only, default should not be entered, without proof that a copy of the notice was directed to defendant, or that his residence could not be ascertained. After such notice and default, the proof will not be presumed; it should appear of record. *Broghill* v. *Lash*, 357

4. Service of notice to defendants must be complete ten days before the appearance term; if the notice is given by publication, the four weeks' notice required by Code, § 1725, must have been published ten days before the term at which judgment is rendered. *ib.*

See APPEAL, 1,
CHANGE OF VENUE, 1,
MINERAL LAND.

ORDER, OR INLAND BILL.

1. To justify a recovery upon an order not accepted, it is not necessary for the plaintiff to prove that the defendant was indebted to the payee at the date of the order. *Tryon* v. *Oxley*, 289

2. A failure to present an order drawn for lumber, within one week from

its date, does not show want of due diligence. *ib.*

3. Unless shown that the drawer of an order or inland bill, sustained injury by the delay, it is sufficient to show presentment or demand at any time before suit. *ib.*

4. Where an order was signed by "D T., administrator," without designating the estate for which he acted, judgment may be rendered against him personally. *ib.*

OFFICER.

An officer not liable in trespass for the erroneous exercise of official acts, if he did not exceed his authority or act corruptly. *Hetfield* v. *Towsley*, 584

PARTIES.

See SETTLEMENT, 1.

PARTNERS.

1. No private arrangement between partners, by articles or otherwise, will bind third parties, without actual notice. *Devin* v. *Harris*, 186

2. A change in a partnership will effect persons dealing with the firm, without actual notice. *ib.*

3. After a dissolution, the settling partner may sign the name of the firm to a note, to settle or liquidate a company debt, but not to cast a new indebtedness against the firm. *Kemp* v. *Coffin*, 190

4. Where money was paid upon the draft of one of three partners, but paid and used on joint account for the benefit of the firm, held that such advance might be recovered as an item in account against the firm. *Beebe* v. *Rogers*, 319

See WITNESS, 5, 7.

PARTITION.

1. An action of partition should be brought up by writ of error, and not by appeal. *Cooper* v. *Armstrong*, 120

2. The action of partition a mixed proceeding of law and equity, in which the equity powers are made subservient to the statute and to common law rules. *ib.*

3. Partition suits can be adjudicated in the supreme court on errors at law only. *ib.*

4. Judgment of partition, effectual and conclusive upon all persons whatsoever; and any fraud in such partition can only be avoided by him who had a prior interest in the estate, and not by him who, subsequent to such fraud, purchased such interest. *Brace* v. *Reid*, 422

5. Where a petition seeks to set aside a judgment of partition for fraud, and where there were intermediate purchasers under the partition, notice of such fraud should be alleged against them as well as against the defendant. *ib.*

6. A title made certain by a judgment of partition cannot be collaterally changed, nor can such judgment be impeached by the same petition which claims rights under it. *ib.*

PATENTS.

See LAND TITLE, 2, 3.

PAYMENT.

Where payment was to be made in sawing, and the payor gave notice of a readiness to do the work, but the payee neglected to deliver the logs to be sawed before the mill was carried away by a freshet; held that the destruction of the mill did not convert this into a cash claim, unless the sawing was demanded and not furnished within a reasonable time. *Davidson* v. *Overhulser*, 196

See INTERESTS, 3.
PROMISSORY NOTES, 5, 6.

PLEADINGS.

1. AT LAW.

1. To an indictment for selling liquor without a license, the defendant pleaded that he had a license, and issue was joined upon that plea, and upon that issue the jury found the defendant guilty; held that the plea should have been "not guilty;" that the state should not have joined issue upon any other plea, and that the verdict and judgment rendered under such an issue should have been arrested. *Peters* v. *State*, 74

2. An issue on the plea of *nul tiel record*, is to the court and not to the jury; and upon a record which involves no question of jurisdiction or fraud, it is the only proper plea. *Hindman* v. *Mackall*, 170

3. *Nil debit* not appropriate to a judgment record which is not objected to for fraud or want of jurisdiction, but under such a plea, want of jurisdiction and fraud may be shown. *ib*

4. Under the plea of *nil debit*, the defendant may show that the attorney had no power or authority to confess judgment against him, and while such a plea and proof are pending, it is error to render judgment on the plea of *nul tiel record*, *ib.*

5. In a suit against an estate where the pleadings do not show that the liability was joint, nor that there was a surviving partner, nor even an effort to have the co-debtor made a party, the plaintiff may recover if his claim is proved. *Bonnon* v. *Urton*, 228

6. No error in striking out, or sustaining demurrer to pleas that are inapplicable or insufficient. *Sawford* v. *Whipple*, 261

7. Where a portion of the pleas were stricken out, without exception, and defendant went to trial on pleas considered good, the ruling of the court below, in relation to the rejected pleas will not be reviewed. *ib.*

8. Under the Code formal defects are not demurrable, and substantial defects should be demurred to specially. *Crittenden* v. *Steel*, 538

9. S. gave J. a letter of credit on C. for paper, in which he promised as follows. "If you will fill his order I will be responsible;" held that this was an original undertaking, and a failure to aver demand and notice in the petition is not good ground for a general demurrer. *ib.*

10. The averments in a petition or answer under demurrer will be regarded as true. *Babbit* v. *Walters*, 564

11. A demurrer under the Code should be special. *ib.*

12. Technical forms of action and of pleading are abolished by the Code. *Heichew* v. *Hamilton*, 596

13. A petition under the Code is good if it shows a substantial cause of action, by a fair and natural construction of the language in which the facts are stated. *ib.*

2. IN EQUITY.

14. When a bill is not sworn to, nor supported by proof, the facts averred in the answer and sworn to, are to be taken as true upon all points responsive to the bill. *Garretson* v. *Vanleon*, 128

15. Where an answer is not sufficiently explicit and responsive, an amended answer may be required. *Feller* v. *Winchester*, 244

16. A petition to set aside a judgment is defective, unless it avers that the judgment is unjust and oppressive, and that there is a good defense. *Piggott* v. *Addicks*, 427

17. In a bill to foreclose a mortgage a statement of the substance of such instrument is all that is required; and if a question is raised in relation to the mortgage a certified copy is admissible in evidence where the original is not within the control of the party wishing to use the same. *Knetzer* v. *Bradstreet*, 487

18. Where a respondent was required by rule to plead answer or demur within thirty days, and within that time submitted a demurrer to the decision of the court, and having rested his case upon such decision without filing an affidavit of merits, the decree rendered before the expiration of said thirty days will not be disturbed. *ib.*

See EQUITY, 5, 6, 7.
SLANDER,
UNLAWFUL DETAINER, 1, 2.
TRUST, 4.

PRACTICE.

1. A party waives his objection to the ruling of the court on demurrer by amending his declaration to meet the objection, and going to trial on the merits. *Taylor* v. *Galland*, 17

2. Whether the grantor of a deed was a minor, is a question of fact to be decided by a jury. If decided by the court, it will be presumed that the question was by agreement submitted to the court, and that the court decided correctly. *Cooper* v. *Armstrong*, 120

3. On overruling defendant's demurrer, it is error to render judgment against him, without disposing of his plea on file. *Baldwin* v *Winn*, 180

4. Where a default is set aside on affidavit of merits, and the defendant thereupon files a demurrer as well as an answer, it is not error under the code, to reject the demurrer. *Perkins* v. *Davis*, 235

5. J. L. sued M., on an account that was originally due to S. M., and it was rejected by the justice because suit was not commenced by the legal party; subsequently the account was sued by S. M., for the use of J. L.; held that the first suit was no bar to the second. *Miller* v. *Langworthy*, 347

6. Law and equity not to be blended in the same action. *Cooper* v. *Armstrong*, 120

7. Upon a proper showing where there are no intervening rights, in the exercise of a sound discretion, a court may open its own judgments and set them aside when improperly or wrongfully obtained. This discretion not interferred with by the Code. *Bailey* v. *Hearn*, 415

8. A complainant cannot preclude respondent from answering under oath. *Armstrong* v. *Scott*, 433

9. If a sworn answer is waived, it does not affect the right of respondent to file such answer, nor impair its weight as evidence. *ib.*

10. Under the Code issues of fact may be tried by the court unless one of the parties requires a jury. *Hine* v. *Sweney*, 511

11. On a motion for a non-suit at the close of plaintiff's testimony, the court should consider every fact fully proved which the testimony, tended to prove, and if those facts are not sufficient at law to justify a verdict and judgment for plaintiff, the non-suit should be granted. *Miles* v. *Townsend*, 546

12. Where money was furnished by plaintiff under a written agreement that it should "be laid out in claims on land, for which he is to have the principal and one-half the profit arising thereon," and the evidence showed that the money was accordingly invested, and nothing realised from the claims; held that plaintiff could not recover in assumpsit on common counts, and that as the evidence tended to show the foregoing facts only, the court was justified in taking the case from the jury and granting a non-suit. *ib.*

13. An application for the appointment of a commissioner to take depositions made about the time set for the trial of the cause was denied, and the court decided that as the cause had been set for trial at the previous term, and as the witnesses were in attendance, the trial should go on, and that the witnesses might be examined accordingly; held that the proceeding was justifiable *Hamilton* v. *Walters*, 556

14. G. and B. were made defendants to a suit, but there was no service upon B. nor judgment rendered against him. On the trail it appeared that B. was improperly made a party, but G. did not raise the objection in the court below; held that if there was error in the proceeding as to B., advantage could not be taken of it by G. *Granger* v. *Busick*, 570

15. A judgment will not be reversed for errors that do not affect the party seeking to reverse. *ib.*

16. Upon a trial of a question of fact, under the Code, the written decision need not state the evidence upon which the facts were decided; nor need the facts as found be given in writing, unless requested by one of the parties. *Houston* v. *Trimble*, 574

17. If defendant makes default, a decree *pro confesso* may be rendered against him without evidence in support of the bill. *Humphreys* v. *Darlington*. 588

18. Unless the contrary appears of record, it will be presumed that the decree was authorized by the evidence. *ib.*

19. Objections to a petition, where the court has jurisdiction, are waived by going to trial on the issues joined, without reserving exceptions. *Stiles* v. *Brown*, 589

20. Any action of the court below upon immaterial and irrelevant questions and answers in taking testimony, would not justify a change in the decision. *Hamilton* v. *Walters*, 556

See EVIDENCE,
JURY, 4,
JUSTICE OF THE PEACE,
NEW TRIALS,
NOTICE, 12,

PROMISSORY NOTES.

1. Possession of a note payable to bearer is *prima facie* evidence of ownership, and such a note may be sued in the name of any holder. *Shelton* v. *Sherfey*, 108

2. A note made payable to J. S. or *order* and endorsed by the payee to S. T. or *bearer*, becomes, in the hands of subsequent holders, the same as a note payable to *bearer*. *ib.*

3. An agreement to pay a certain portion of a promissory note when collected, amounts to an equitable transfer of that portion of the note, and such portion cannot be claimed as part of the assets of the in-

solvent payer. *Gallinger* v. *Pomeroy*, 178

4. One of two joint and several makers of a note, was not served with process, but he signed the appeal bond as surety; held that this act did not constitute an appearance as principal. *Hendrick* v. *Kellogg*, 215

5. A note promising a payment of seventy-five dollars, "on or before the fifteenth of April next," with a condition, "if paid by the first of April, fifty dollars shall discharge the note;" held that an endorsement of fifty-five dollars and fifty cents on the ninth of April did not satisfy the note. *Holland* v. *Vanard*, 230

6. The failure to pay by the time stipulated, made the penalty binding, and added that amount to the indebtedness. *ib.*

7. A note made payable to D. or *bearer* is transferred to the holder by delivery, and possession is *prima facie* evidence of ownership. *Allensworth* v. *Moore*, 273

8. When M., as holder of a $100 note, payable to bearer, gave a receipt for it in Kentucky for $53 50, "to be paid when the note becomes due;" held that such receipt would not preclude M. from maintaining an action in his own name, on said note. *ib.*

9. Where the indorser at the time he assigned the note, requested the indorsee not to enforce collection against the maker until the next fall after the note became due, and during such indulgence the maker became insolvent; held that the indorser could show these facts by parole in justification of the delay. *Friend* v. *Beebe*, 279

10. An indorser of a note cannot avail himself of delay in commencing suit against the maker, where he expressly requested such indulgence for the maker. *ib.*

11. Parole evidence admissible to show upon what terms and conditions the note was assigned by indorsement. *ib.*

12. A note for a certain sum in property not negotiable at common law; but such a note is assignable under the statute of Iowa; and when payable to *bearer* may be sued in the name of any holder. *Riggs* v. *Price*, 334

13. Where a note is made payable to bearer, possession is *prima facie* evidence of ownership, without proof of indorsement, and a denial of ownership should be sustained by evidence. *Breckbill* v. *Stutyman*, 572

14. Where a promissory note was given for a certain quantity of land, and stipulated that if the quantity did not hold out, that a corresponding deduction should be made from the amount of the note; held that the *onus* was upon defendant to show that the land did not contain the stipulated quantity. *Jewett* v. *Lyon*, 577

See CONSIDERATION, 2, ORDER.

POWER OF ATTORNEY.

An attorney confessed a decree of foreclosure by virtue of a power of attorney, but the decree was erroneous in computation and reversed, held that the attorney could again confess a decree under the same power. *Huner* v. *Doolittle*, 76

RAILS.

1. Rails not laid in a fence are no part of the realty. *Robertson* v. *Phillips*, 220

2. A. owned a claim on public land and had a quantity of rails, which were in piles at the time B. entered

the land; held that the rails were no part of the realty, that they were the property of A., that B. had no right to sell them to defendant, who had taken them off, and that defendant was liable to A. for the value of the rails. *ib.*

RECOGNIZANCE.

1. On an appeal from a justice of the peace the surety in the recognizance was wanted as a witness, and a new recognizance was authorzed in the district court. *Hammett* v. *Coffin*, 205

2. Where a recognizance is entered into before the clerk and approved by him, and is otherwise in compliance with the statute, it shall have the effect of a judgment confessed. *Lewis* v. *Mull*, 437

3. A bond under seal cannot operate as a judgment confessed, because it is not a recognizance as provided by statute. *ib.*

RECORD.

See EVIDENCE, TRANSCRIPT.

REPLEVIN.

1. In an action of replevin, on the question of ownership, a conversation with the party who claimed and had, the property in possession, may be admissible in evidence. *Ross* v. *Hayne*, 211

2. An action of replevin of personal property cannot be maintained by a mortgager against the sheriff, when the property was levied by direction of the mortgagee upon an execution against both him and the mortgager. *Talbot* v. *DeForest*, 586

See ATTACHMENT, 6.

RESULTING TRUST.

See TRUST.

RETURN OF SERVICE.

See ATTACHMENT, 10.

REVENUE LAW.

The thirteenth section of the Revenue Law of 1844, is not repealed by the Revenue Law of 1847. *Ament* v. *Humphrey*, 255

SALE OF GOODS.

A sale of materials for a nine pin alley, not unlawful, and will not preclude a recovery or mechanic's lien. *Dorsey* v. *Langworthy*, 341

SCHOOL FUNDS.

The entire proceeds of fines for penal offences, without abatement for attorney fees, to go into school fund. *Woodward* v. *Gregg*, 287

SCHOOL TAX.

A. resided in school district No. 1, and had his store in district No. 2, held that his personal property in No. 2 was not liable for his school tax in No. 1. *Ament* v. *Humphrey*, 255

SCIRE FACIAS.

It is error to order execution on *scire facias* against a person who is not made a party to the proceeding. *Malony* v. *Bourne*, 330

See BANKRUPTCY, 4.

SERVICE OF WRIT.

Where the Code provides that a copy of notice may be left at defendant's usual place of residence, it is not sufficient to leave the copy with a clerk at the store of defendant. But such defect is cured by appearance. *Winchester* v. *Cox*, 575

See APPEARANCE, 1.

SET OFF.

See CONTRACT, 7.

SETTLEMENT.

1. A settlement of the cause of action in replevin by one joint defendant is a settlement as to all. *Taylor* v. *Galland*, 17

2. When parties undertake to settle a legal controversy by assigning their respective conflicting claims to a third party in interest, a court of law will favor such assignment, so far as it can be done consistently with established principles of law, even if such assignment does not amount to a technical release or accord and satisfaction. *ib.*

SHERIFF.

Damages may be recovered against a sheriff for an illegal sale of land if the plaintiff was deprived of his title by such sale. *Napier* v. *Wiseman*, 246

SIGNATURE.

See CONTRACT, 13, 14.

SLANDER.

1. In slander words are in themselves actionable, if being true they would subject the party charged to an indictment for a crime involving moral turpitude or infamous punishment. *Burton* v. *Burton*, 316

2. Where the declaration charges actionable words to have been "publishd of, and concerning the plaintiff," it is not necessary to allege that they were spoken in the presence of some person. *ib.*

SPANISH LAW.

Spanish law as to mixture of gold dust prevails in California. *Goodenow* v. *Snyder*, 599

SPECIFIC PERFORMANCE.

1. A bill for specific performance should be dismissed, if complainant does not aver performance, or an offer to perform his part of the contract. *Garretson* v. *Vanloon*, 128

2. In a case of dependent covenants, to pay money and to give a deed, it is only necessary to show a readiness to pay at the time stipulated, in a proceeding for a specific performance. *McDaneld* v. *Kimbrell*, 335

3. To sustain a bill for specific performance of a parole agreement, the material allegations in the bill should be sustained by proof; and sufficient performance should be shown to take the case out of the statute of frauds. *Olive* v. *Dougherty*, 371

4. A party claiming specific performance must show his full compliance with all the terms of the contract. *ib.*

5. A contract for specific performance should be mutual and certain in all its parts. *ib.*

STATUTES.

1. Where two statutes, passed at different terms in relation to the same

subject matter, the subsequent act does not repeal the former, if both can be made to harmonize. *Hummer* v. *Hummer*, 42

2. The act passed for the benefit of settlers on the "Half Breed Lands" in 1840, cannot be interposed against a title confirmed by the judgment of partition in *Spaulding et. al.* v. *Antonya et. al.* Said act became inoperative by its own limitation, as soon as the title to said "lands" became settled by due course of law. *Wright* v. *Millard*, 86

3. A statute in derogation of common law should be strictly construed, and confined to the object of its enactment. *ib.*

4. To aid in the construction of a statute, other statutes in *pari materia* may be considered. *Morrill* v. *Miller*, 104

5. A subsequent law upon the same subject matter does not necessarily repeal the antecedent law; unless the former is expressly repealed or superseded, both should be enforced as far as possible without conflict. *Ament* v. *Humphrey*, 255

STATUTES OF LIMITATION.

The statute of limitations cannot be pleaded to an action of debt on a judgment from another state. *Latourette* v. *Cook*, 593

SUBSCRIPTION PAPER.

1. A subscription paper for improvements in a street, will hold the parties to it, as to a promissory note, and where the payee indorsed the paper over in part payment for the improvement, he will be held as indorser, and as guarantor of the genuineness of the signatures. *McCormack* v. *Reece*, 591

2. Where a subscription paper "promises to pay as the work progresses," proof that the work was not finished not admissible. *ib.*

SUPREME COURT.

See COURT, PRACTICE, 18, 20.

SURETIES.

See APPEAL, 3.

TAX TITLE.

1. An assessment book, not admitted in evidence, in part proof of a tax-title, without first showing the appointment of the equalizing officers. Greene, J. *contra*. *Scott* v. *Babcock*, 133

2. A tax sale, not legal unless all the requirements of the statute have been strictly performed. *ib.*

3. Nothing can be presumed in favor of the proceedings of officers, in order to sustain a tax title. Greene, J. *contra*. *ib*

4. A tax deed for delinquent taxes of 1843, not admissible in evidence, without proof of the assessment, collector's return, &c. *ib.*

5. Under the revenue laws of 1844, lands are not subject to sale for taxes, until *three* years after the taxes have become due, and remain unpaid. *Abbe* v. *The State*, 1 G. Greene, 225, *contra*. *ib.*

TENDER.

In approving a tender where the party produced the money and offered to pay the amount due on an agreement for a deed, and the other party refused to take the money or furnish the deed, without any objection to the amount offered, it is sufficiently certain without proving that the money was counted: nor need the money be deposited in court and the tender kept good. *McDaneld* v. *Kimbrell*, 335

TIME.

See EQUITY, 1, 2, 3,

TORTS.

1. Torts such as die with the party cannot be assigned; but those affecting rights vested *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property may pass by assignment. *Taylor* v. *Galland*, 17

2. Without a statute expressly authorizing it, a party cannot sue in debt for a tort. *Eads* v. *Pitkin*, 77

TRANSCRIPT.

1. The sworn certificate of a judge and clerk admitted to show certain items in an amended transcript which was lost, in order to show that the adjudication thereon was correct. *Coffeen* v. *Hammond*, 241

2. A certified transcript of the record —and not the original papers— should be sent to to the supreme court, on appeal. *Huston* v. *Huston*, 248

See VARIANCE.

TRESPASS.

See LANDLORD AND TENANT, 6, OFFICE.

TRUST.

1. To constitute a resulting trust by parole, it should be conclusively proved that the purchase money belonged to the *cestui que trust* or was advanced for him by some other person as a loan or gift. *Olive* v. *Dougherty*, 371

2. There is no resulting trust in real estate, where there was no undertaking to buy, no money furnished, and no written memorandum of the arrangement. *ib.*

3. A trust will not be implied or presumed unless supported by strong circumstances showing that such trust was intended. *Brace* v. *Reid*, 422

4. Where a petition seeks a recovery by virtue of a trust, it should be substantially charged with reasonable certainty.

See DEED, 7,
EQUITY, 4,
LAND CLAIMS.

UNLAWFUL DETAINER.

1. A complaint for unlawful detainer concluded with the averment "that said defendant did refuse and neglect to quit such possession, but continued to withhold the same from plaintiff," &c., held that it sufficiently charged "that defendant detained the premises at the time suit was commenced." *Rivereau* v. *St. Ament*, 118

2. Defects in complaint waived by pleading over, and cured by verdict. *ib.*

3. The complaint in an action of unlawful detainer is good, if it avers in substance all the facts required by statute. *Simons* v. *Marshall*, 502

VARIANCE.

1. A matter of variance, involving no ambiguity or question of fact, is not for the jury, but should be decided by the court. *Hendrick* v. *Kellogg*, 215

2. An erroneous description of a note in a justice's transcript may be corrected by an amended transcript. A variance resulting from such description is not sufficient ground for non suit. *Higley* v. *Bryan*, 284

VERDICT.

1. In an action of right, where the plaintiff proved himself entitled to only two-thirds of a lot, the verdict should correspond with the evidence, and not be general for the plaintiff. Rev. Stat. 340, § 33-4. *Hughes* v. *Holliday*, 30

2. Where the record does not show that there was not sufficient evidence to justify the verdict, the discretion exercised below, in refusing a new trial, will not be disturbed. *Levin* v. *Harris*, 186

See JURORS, 1.
JUDGMENT.

WARRANTY.

In the sale of chattels where the seller had possession, the law implies a warranty of title, and a promise to refund is implied, if he did not own the property sold. *Barton* v. *Faherty*, 327

WITNESS.

1. Where a sheriff, nominally made plaintiff in connection with others who were the real parties in interest, was called upon to testify in behalf of the defendant, it was held that his testimony was admissible, but not so when called upon to testify in behalf of his co-plaintiffs. *Taylor* v. *Galland*, 17

2. A witness not required to state the very language, as testified by a deceased witness, but should give the substance of all his testimony. *Rivereau* v. *St. Ament*, 118

3. On a cross examination, it is not error to put questions to a witness with the object of impeaching him by other testimony. *Ross* v. *Hayne*, 211

4. Latitude and discretion recognized in the examination of witnesses. *ib.*

5. A stranger to the suit cannot release and indemnify a party to the record so as to make him a competent witness for his co-partners. *Wise* v. *Patterson*, 471

6. It is competent to show that a witness has made statements on other occasions at variance with his testimony on the trial, in order to impair his credibility. *Glenn* v. *Carson*, 529

7. Where a witness is shown to be interested as a partner by other witnesses, he is not competent to testify even as to his interest on *voir-dire*. *Robinson* v. *Turner* 540

8. In a suit conducted by an administrator of an estate, where the father is the sole heir at law of the intestate, it is error, under the Code, to admit the father as a witness in behalf of the estate. *Cushman* v. *Blakesly*, 542

See EVIDENCE.
JURORS, 1.
RECOGNIZANCE, 1.

Ex. G. a. a.